TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 288.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

CHARLES H. FREEMAN, EDGAR H. RIGGS, AND WILLIAM W. MOSSMAN.

IN ERROR TO THE SUPREME COURT OF THE UNITED STATES OF THE DISTRICT OF COLUMBIA.

FILED SEPTEMBER 18, 1908.

(21080)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 627.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

CHARLES H. FREEMAN, EDGAR M. BIGGS, AND WELCH W. NOSSAMAN.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

INDEX.

	Original.	Print.
Caption	1	1
Order for bench warrant, etc	1	1
Indictment	2	1
Order to plead	27	13
Demurrer of Welch W. Nossaman	28	13
Demurrer of Charles H. Freeman et al	47	22
Motion to quash by Welch W. Nossaman	70	33
Motion to quash by Charles H. Freeman et al	72	34
Plea of Welch W. Nossaman	75	35
Order beginning hearing	80	37
Order concluding hearing	81	38
Order sustaining demurrers, etc	81	38
Judgment	83	39
Bill of exceptions	86	40
Opinion	88	42
Opinion in U. S. *v.* Biggs et al. (Omitted in printing.)		
Judge's certificate to bill of exceptions	116	43
Acceptance of service of bill of exceptions	116	44
Petition for writ of error	118	44
Order allowing writ of error	119	45
Assignment of errors	120	45
Order allowing writ of error	129	50
Præcipe for transcript	130	51
Writ of error	131	51
Return on writ of error	131½	52
Citation and service	132	52
Clerk's certificate	133	53
Opinion. (Omitted in printing.)		
Clerk's certificate	137	54
Stipulation to omit part of record in printing	138	54

1 Pleas in the District Court of the United States for the District of Colorado, sitting at Denver.

Be it remembered that heretofore and on, to wit, the twenty-second day of June, A. D. 1907, the same being one of the regular juridical days of the May term, A. D. 1907, of said court.

Present: The Honorable Robert E. Lewis, district judge, the following proceeding was had and entered of record in said court, to wit:

In the matter of the grand jury.

At this day come the members of the grand jury heretofore duly empanelled and sworn as grand jurors and return into court now here the following true bills of indictment, to wit:

* * * * * * * *

THE UNITED STATES OF AMERICA *vs.* CHARLES H. FREEMAN, EDGAR M. Biggs, and Welch W. Nossaman.	2027. Indictment for conspiracy to defraud the United States.

(Endorsed:) A true bill. (Signed) E. D. Welker, foreman.

And thereupon it is ordered by the court that a bench warrant issue without delay against the defendants and returnable forthwith; and that the defendants be let to bail before an

2 United States commissioner for their appearance in this court from day to day and from term to term, to answer unto the indictment herein as follows, to wit: Charles H. Freeman in the sum of three thousand dollars ($3,000), Edgar M. Biggs in the sum of five thousand dollars ($5,000), and Welch W. Nossaman in the sum of three thousand dollars ($3,000).

* * * * * * *

And the said indictment is in words and figures as follows, to wit:

In the District Court of the United States of America for the District of Colorado, of the May term, in the year nineteen hundred and seven.

DISTRICT OF COLORADO, *ss:*

The grand jurors for the United States of America, impaneled and sworn in the District Court of the said United States for the District of Colorado, and inquiring for that district, upon their oaths present that Charles H. Freeman, Edgar M. Biggs, and Welch W. Nossaman, late of the city of Durango, in the said district, on the thirtieth day of March, in the year nineteen hundred and one, and at the several times of the committing of the several overt acts

3 hereafter in this indictment mentioned, and continuously at all times between the said thirtieth day of March, in the year

last aforesaid, and the day of the presenting of this indictment, at Durango aforesaid, in the said district, unlawfully, corruptly, wickedly, and maliciously did conspire, combine, confederate, and agree together, and with divers other persons to the said grand jurors unknown, indirectly to obtain from the said United States for a certain corporation, to wit, The New Mexico Lumber Company, theretofore organized under the laws of the State of Colorado and then and there existing under that name, a large quantity, to wit, seventeen hundred and sixty acres, of timber lands in excess of the quantity of such lands which the said corporation could lawfully obtain directly from the said United States, regard being had to the laws thereof pertaining to the entry and sale of such lands; which said timber lands so to be obtained then were lands lying within the Durango land district, in the said district of Colorado, which were surveyed vacant public lands of the said United States not included within any military, Indian, or other reservation, lands which had not been offered at public sale according to law, and which were unfit for cultivation, chiefly valuable for timber, and open to entry at the land office of the said United States at Durango aforesaid under the laws of the said United States pertaining to the entry and sale of timber
4 lands and under the regulations theretofore made and prescribed pursuant to law by the Commissioner of the General Land Office, with the approval of the Secretary of the Interior; descriptions of which said lands by legal subdivisions are set forth in that part of this indictment where the said Charles H. Freeman and Welch W. Nossaman are charged with the committing of overt acts in procuring the execution and verification of certain documents, each entitled "Testimony of Claimant," by certain persons respectively in these documents named, for presentation by them to the register of the said land office at Durango aforesaid, and through him to the said Commissioner and the said Secretary, in connection with the entry of the same lands by those persons in quantities allowed to them, respectively, by law, being overt acts numbered 1 to 11, both inclusive.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present that the said timber lands were so to be obtained as aforesaid from the said United States for the said corporation by the said defendants soliciting and procuring the persons aforesaid, for hire and under agreements with them separately to that end, to pay to the receiver of the said land office, with moneys to be furnished to them by the said corporation, the price fixed by law therefor,
5 make entries as individual entrymen, at the land office aforesaid with the said register, of tracts of such lands in quantities respectively not exceeding the quantities allowed by the said laws and regulations, secure patents from the said United States for the said lands to themselves as such entrymen, and make conveyances of the title to the said lands to the said corporation.

OVERT ACTS.

1. And the grand jurors aforesaid, upon their oaths aforesaid, do further present that further in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said Charles H. Freeman afterwards, to wit, on the thirtieth day of March, in the same year nineteen hundred and one, at Durango aforesaid, in the said District of Colorado, unlawfully did, by solicitation and promise of reward to him in the sum of seventy-five dollars, induce and procure one Leslie W. Smith to execute and verify by his oath before the said register a certain document in the form prescribed by law and entitled "Testimony of Claimant," for presentation by the said Leslie W. Smith to the said register, and through the said register to the said Commissioner and the said Secretary, in connection with the entry by the said Leslie W. Smith at the said land office at Durango of the following-described timber lands, to wit: The north half
6 of the northwest quarter of section five, and the north half of the northeast quarter of section six, in township thirty-three north and range five west, reference being had to the New Mexico principal meridian and its base line, containing one hundred and sixty acres.

2. And the grand jurors aforesaid, upon their oaths aforesaid, do further present that further in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said Charles H. Freeman afterwards, to wit, on the ninth day of April, in the same year nineteen hundred and one, at Durango aforesaid, in the said District of Colorado, unlawfully did, by solicitation and promise of reward to him in the sum of seventy-five dollars, induce and procure one Joseph F. Bird to execute and verify by his oath before the said register a certain document in the form prescribed by law and entitled "Testimony of claimant," for presentation by the said Joseph F. Bird to the said register, and through the said register to the said Commissioner and the said Secretary, in connection with the entry by the said Joseph F. Bird at the said land office at Durango of the following-described timber lands, to wit: The west half of the southwest quarter of section twenty-two, and the north half of the southeast quarter of section twenty-one in town-
7 ship thirty-four north and range five west, reference being had to the New Mexico principal meridian and its base line, containing one hundred and sixty acres.

3. And the grand jurors aforesaid, upon their oaths aforesaid, do further present that further in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said Charles H. Freeman afterwards, to wit, on the ninth day of April, in the same year nineteen hundred and one, at Durango aforesaid, in the said

District of Colorado, unlawfully did, by solicitation and promise of reward to him in some small sum of money the amount whereof is to the said grand jurors unknown, induce and procure one Jess E. Rossell, jr., to execute and verify by his oath before the said register a certain document in the form prescribed by law and entitled "Testimony of claimant," for presentation by the said Jess E. Rossell, jr., to the said register, and through the said register to the said Commissioner and the said Secretary, in connection with the entry by the said Jess E. Rossell, jr., at the said land office at Durango, of the following-described timber lands, to wit: The southwest quarter of the northwest quarter of section twenty-seven, the east half of the northeast quarter of section twenty-eight, and the southeast quarter of the southeast quarter of section twenty-one, in township thirty-
8 four north and range five west, reference being had to the New Mexico principal meridian and its base line, containing one hundred and sixty acres.

4. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that further in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said Welch W. Nossaman afterwards, to wit, on the eighteenth day of June, in the same year nineteen hundred and one, at Durango, aforesaid, in the said District of Colorado, unlawfully did, by solicitation and promise of reward to him in the sum of seventy-five dollars, induce and procure one Mark Todd to execute and verify by his oath before the said register, a certain document in the form prescribed by law and entitled "Testimony of Claimant," for presentation by the said Mark Todd to the said register, and through the said register to the said Commissioner and the said Secretary, in connection with the entry by the said Mark Todd, at the said land office at Durango, of the following-described timber lands, to wit: The northeast quarter of the northeast quarter of section nine, the south half of the southeast quarter of section four, and the west half of the northwest quarter of section ten, in township thirty-four north and range two
9 west, reference being had to the New Mexico principal meridian and its base line, containing one hundred and sixty acres.

5. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that further in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation and agreement, and to effect the object of the same, the said Welch W. Nossaman afterwards, to wit, on the eighteenth day of June, in the same year nineteen hundred and one, at Durango aforesaid, in the said District of Colorado, unlawfully did, by solicitation and promise of reward to him in the sum of seventy-five dollars, induce and procure one William H. Norton to execute and verify by his oath before the said register a certain document in the form prescribed by law and entitled "Testimony of Claimant," for presentation by the said William H. Norton to the said register, and through the said register to the said Commissioner and the said Secretary, in connec-

tion with the entry by the said William H. Norton at the said land office at Durango of the following-described timber lands, to wit: The southeast quarter of the northwest quarter, and the west half of the northwest quarter of section nine, and the northeast quarter of the northeast quarter of section eight, in township thirty-four north and range two west, reference being had to the New Mexico principal meridian and its base line, containing one hundred and sixty acres.

6. And the grand jurors aforesaid, upon their oaths aforesaid do further present that further in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said Charles H. Freeman afterwards, to wit, on the seventh day of August, in the same year nineteen hundred and one, at Durango, aforesaid, in the said District of Colorado, unlawfully did, by solicitation and promise of reward to him in the sum of one hundred dollars, induce and procure one James Waber to execute and verify by his oath before the said receiver a certain document in the form prescribed by law and entitled "Testimony of Claimant," for presentation by the said James Waber to the said register, and through the said register to the said Commissioner and the said Secretary, in connection with the entry by the said James Waber, at the said land office at Durango, of the following-described timber lands, to wit: The north half of the northeast quarter of section twelve, the southwest quarter of the southeast quarter, and the southeast quarter of the southwest quarter of section one, in township thirty-four north and range five west, reference being had to the New Mexico principal meridian and its base line, containing one hundred and sixty acres.

7. And the grand jurors aforesaid, upon their oaths aforesaid, do further present that further in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said Charles H. Freeman afterwards, to wit, on the seventh day of August, in the same year nineteen hundred and one, at Durango aforesaid, in the said District of Colorado, unlawfully did, by solicitation and promise of reward to him in the sum of one hundred dollars, induce and procure one William C. Hyler to execute and verify by his oath before the said receiver a certain document in the form prescribed by law and entitled "Testimony of Claimant," for presentation by the said William C. Hyler to the said register, and through the said register to the said Commissioner and the said Secretary, in connection with the entry by the said William C. Hyler at the said land office at Durango of the following-described timber lands, to wit: The southwest quarter of the northeast quarter, the east half of the northwest quarter, and the northwest quarter of the northwest quarter, of section nine, in township thirty-four north and range five west, reference being had to the New Mexico principal meridian and its base line, containing one hundred and sixty acres.

8. And the grand jurors aforesaid, upon their oaths aforesaid, do further present that further in pursuance of the said
12 unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said Charles H. Freeman afterwards, to wit, on the eighth day of August, in the same year nineteen hundred and one, at Durango aforesaid, in the said District of Colorado, unlawfully did, by solicitation and promise of reward to her in some small sum of money, the amount whereof is to the said grand jurors unknown, induce and procure one Myrtle Bostwick to execute and verify by her oath before the said register a certain document in the form prescribed by law and entitled "Testimony of Claimant," for presentation by the said Myrtle Bostwick to the said register, and through the said register to the said Commissioner and the said Secretary, in connection with the entry by the said Myrtle Bostwick at the said land office at Durango of the following-described timber lands, to wit: The east half of the northeast quarter and the east half of the southeast quarter of section thirty-five, in township thirty-five north and range five west, reference being had to the New Mexico principal meridian and its base line, containing one hundred and sixty acres.

9. And the grand jurors aforesaid, upon their oaths aforesaid, do further present that further in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination confed-
13 eration and agreement, and to effect the object of the same, the said Charles H. Freeman afterwards, to wit, on the tenth day of August, in the same year nineteen hundred and one, at Durango aforesaid, in the said District of Colorado, unlawfully did, by solicitation and promise of reward to him in the sum of seventy-five dollars, induce and procure one William E. Furrow to execute and verify by his oath before the said register a certain document in the form prescribed by law and entitled "Testimony of Claimant," for presentation by the said William E. Furrow to the said register, and through the said register to the said Commissioner and the said Secretary, in connection with the entry by the said William E. Furrow at the said land office at Durango of the following-described timber lands, to wit: The northwest quarter of the northwest quarter, and lot two, in section thirteen, and the east half of the northeast quarter and lot one in section fourteen, in township thirty-four north and range five west, reference being had to the New Mexico principal meridian and its base line, containing one hundred and sixty acres.

10. And the grand jurors aforesaid, upon their oaths aforesaid, do further present that further in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said
14 Charles H. Freeman afterwards, to wit, on the twelfth day of August, in the same year nineteen hundred and one, at Durango aforesaid, in the said District of Colorado, unlawfully did, by solicitation and promise of reward to him in some small sum of money, the amount whereof is to the said grand jurors unknown,

induce and procure one Joe V. Blake to execute and verify by his oath before the said register a certain document in the form prescribed by law and entitled "Testimony of Claimant," for presentation by the said Joe V. Blake to the said register, and through the said register to the said Commissioner and the said Secretary, in connection with the entry by the said Joe V. Blake at the said land office at Durango of the following-described timber lands, to wit: The southeast quarter of the southeast quarter of section thirty-five, in township thirty-five north and range one west, and the north half of the northeast quarter, and the southwest quarter of the northeast quarter, of section two, in township thirty-four north and range one west, reference being had to the New Mexico principal meridian and its base line, containing one hundred and sixty acres.

11. And the grand jurors aforesaid, upon their oaths aforesaid, do further present that further in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said
15 Charles H. Freeman afterwards, to wit, on the twelfth day of August, in the same year nineteen hundred and one, at Durango aforesaid, in the said District of Colorado, unlawfully did, by solicitation and promise of reward to him in the sum of one hundred dollars, induce and procure one Chester H. Eddy to execute and verify by his oath before the said register a certain document in the form prescribed by law and entitled "Testimony of claimant," for presentation by the said Chester H. Eddy to the said register, and through the said register to the said Commissioner and the said Secretary, in connection with the entry by the said Charles H. Eddy at the said land office at Durango of the following-described timber lands, to wit: The southeast quarter of the northeast quarter, the north half of the southeast quarter, and the southeast quarter of the southeast quarter of section thirty, in township thirty-four north and range one east, reference being had to the New Mexico principal meridian and its base line, containing one hundred and sixty acres.

12. And the grand jurors aforesaid, upon their oaths aforesaid, do further present that further in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said Charles H. Freeman, Edgar M. Biggs, and Welch W. Nossaman afterwards,
16 to wit, on the fifth day of May, in the year nineteen hundred and five, at the city of Washington, in the District of Columbia, unlawfully did cause and procure the issuance by the said United States of a patent for the lands described in overt act numbered 1, running to the said Leslie W. Smith, entryman thereof, as in that overt act set forth.

13. And the grand jurors aforesaid, upon their oaths aforesaid, do further present that further in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said Charles H. Freeman, Edgar M. Biggs, and Welch W. Nossaman afterwards,

to wit, on the fifth day of May, in the year nineteen hundred and five, at the city of Washington, in the District of Columbia, unlawfully did cause and procure the issuance by the said United States of a patent for the lands described in overt act numbered 2, running to the said Joseph F. Bird, entryman thereof as in that overt act set forth.

14. And the grand jurors aforesaid, upon their oaths aforesaid, do further present that further in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said Charles H. Freeman, Edgar M. Biggs, and Welch W. Nossaman afterwards, to wit, on the fifth day of May, in the year nineteen hundred and five, at the city of Washington, in the District
17 of Columbia, unlawfully did cause and procure the issuance by the said United States of a patent for the lands described in overt act numbered 3, running to the said Jess E. Russell, jr., entryman thereof as in that overt act set forth.

15. And the grand jurors aforesaid, upon their oaths aforesaid, do further present that further in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said Charles H. Freeman, Edgar M. Biggs, and Welch W. Nossaman afterwards, to wit, on the fifth day of May, in the year nineteen hundred and five, at the city of Washington, in the District of Columbia, unlawfully did cause and procure the issuance by the said United States of a patent for the lands described in overt act numbered 4, running to the said Mark Todd, entryman thereof as in that overt act set forth.

16. And the grand jurors aforesaid, upon their oaths aforesaid, do further present that further in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said Charles H. Freeman, Edgar M. Biggs, and Welch W. Nossaman afterwards, to wit, on the fifth day of May, in the year nineteen hundred
18 and five, at the city of Washington, in the District of Columbia, unlawfully did cause and procure the issuance by the said United States of a patent for the lands described in overt act numbered 5, running to the said William H. Norton, entryman thereof as in that overt act set forth.

17. And the grand jurors aforesaid, upon their oaths aforesaid, do further present that further in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said Charles H. Freeman, Edgar M. Biggs, and Welch W. Nossaman afterwards, to wit, on the fifth day of May, in the year nineteen hundred and five, at the city of Washington, in the District of Columbia, unlawfully did cause and procure the issuance by the said United States of a patent for the lands described in overt act numbered 6, running to the said James Waber, entryman thereof as in that overt act set forth.

18. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that further in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said Charles H. Freeman, Edgar M. Biggs, and Welch W. Nossaman afterwards, to wit, on the fifth day of May, in the year nineteen hundred
19 and five, at the city of Washington, in the District of Columbia, unlawfully did cause and procure the issuance by the said United States of a patent for the lands described in overt act numbered 7, running to the said William C. Hyler, entryman thereof as in that overt act set forth.

19. And the grand jurors aforesaid, upon their oaths aforesaid, do further present that further in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said Charles H. Freeman, Edgar M. Biggs, and Welch W. Nossaman afterwards, to wit, on the fifth day of May, in the year nineteen hundred and five, at the city of Washington, in the District of Columbia, unlawfully did cause and procure the issuance by the said United States of a patent for the lands described in overt act numbered 8, running to the said Myrtle Bostwick, entryman thereof as in that overt act set forth.

20. And the grand jurors aforesaid, upon their oaths aforesaid, do further present that further in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said Charles H. Freeman, Edgar M. Biggs, and Welch W. Nossaman afterwards, to wit, on the fifth day of May, in the year nineteen hundred
20 and five, at the city of Washington, in the District of Columbia, unlawfully did cause and procure the issuance by the said United States of a patent for the lands described in overt act numbered 9, running to the said William E. Furrow, entryman thereof as in that overt act set forth.

21. And the grand jurors aforesaid, upon their oaths aforesaid, do further present that further in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said Charles H. Freeman, Edgar M. Biggs, and Welch W. Nossaman afterwards, to wit, on the fifth day of May, in the year nineteen hundred and five, at the city of Washington, in the District of Columbi unlawfully did cause and procure the issuance by the said United States of a patent for the lands described in overt act numbered 10, running to the said Joe V. Blake, entryman thereof as in that overt act set forth.

22. And the grand jurors aforesaid, upon their oaths aforesaid, do further present that further in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said Charles H. Freeman, Edgar M. Biggs, and Welch W. Nossaman

afterwards, to wit, on the fifth day of May, in the year nineteen hundred and five, at the city of Washington, in the District of Columbia, unlawfully did cause and procure the issuance by the
21 said United States of a patent for the lands described in overt act numbered 11, running to the said Chester H. Eddy, entryman thereof as in that overt act set forth.

23. And the grand jurors aforesaid, upon their oaths aforesaid, do further present that further in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said Welch W. Nossaman afterwards, to wit, on the nineteenth day of February, in the year nineteen hundred and seven, at Pagosa Springs, in the said District of Colorado, unlawfully did require and procure the said Mark Todd to sign and execute a certain deed of conveyance, to wit, a warranty deed of him the said Mark Todd conveying the title to the lands described in overt act numbered 4 from him the said Mark Todd, as grantor, to the said The New Mexico Lumber Company, a corporation as aforesaid, as grantee; which said deed, without the acknowledgement thereof, is of the tenor following, that is to say:

This deed, made this nineteenth day of February in the year of our Lord one thousand nine hundred and seven between Mark Todd, of the county of Archuleta, and State of Colorado, of the first part, and The New Mexico Lumber Company, a corporation, of the county of Archuleta, and State of Colorado, of the second part:

Witnesseth, that the said party of the first part, for and in
22 consideration of the sum of five hundred fifty dollars, to the said party of the first part paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, has granted, bargained, sold, and conveyed, and by these presents does grant, bargain, sell, convey, and confirm unto the said party of the second part, its successors and assigns forever, all the following-described lot or parcel of land situate, lying, and being in the county of Archuleta, and State of Colorado, to wit: The northeast quarter of the northeast quarter of section nine. The south half of the southeast quarter of section four, and the west half of the northwest quarter of section ten, in township thirty-four north of range *of range* two west of New Mexico meridian, containing $159\frac{1.9}{100}$ acres.

Together with all and singular the hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof; and all the estate, right, title, interest, claim, and demand whatsoever of the said party of the first part, either in law or equity, of, in, and to the above bargained premises, with the hereditaments and appurtenances.

To have and to hold the said premises above bargained, and described, with the appurtenances, unto the said party of the second part, its successors and assigns forever. And the said Mark Todd, party of the first part, for himself, his heirs, executors and adminis-

trators, does covenant, grant, bargain, and agree to and with the said party of the second part, its successors and assigns, that at the time of the ensealing and delivery of these presents he is well seized of the premises above conveyed, as of good, sure, perfect, absolute, and indefeasible estate of inheritance, in law, in fee simple, and has good right, full power, and lawful authority to grant, bargain, sell, and convey the same, in manner and form aforesaid, and that the same are free and clear from all former and other grants, bargains, sales, liens, taxes, assessments, and incumbrances of whatever kind or nature soever; and the above bargained premises, in the quiet
23 and peaceable possession of the said party of the second part, its successors and assigns, against all and every person or persons lawfully claiming or to claim the whole or any part thereof, the said party of the first part shall and will warrant and forever defend.

In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

MARK TODD. [SEAL.]

24. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that further in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said Welch W. Nossaman afterwards, to wit on the nineteenth day of February, in the year nineteen hundred and seven, at Pagosa Springs, in the said District of Colorado, unlawfully did require and procure the said William H. Norton to sign and execute a certain deed of conveyance, to wit, a warranty deed of him the said William H. Norton conveying the title to the lands described in overt act numbered 5 from him the said William H. Norton, as grantor, to the said The New Mexico Lumber Company, a corporation as aforesaid, as grantee; which said deed, without the acknowledgment thereof, is of the tenor following, that is to say:

This deed, made this 19th day of February in the year of our Lord one thousand nine hundred and seven between William H. Norton of the county of Archuleta, and State of Colorado, of the first part, and The New Mexico Lumber Company, a corporation, of
24 *of* the county of Archuleta, and State of Colorado, of the second part:

Witnesseth, that the said party of the first part, for and in consideration of the sum of five hundred and fifty dollars, to the said party of the first part in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, has granted, bargained, sold, and conveyed, and by these presents does grant, bargain, sell, convey, and confirm unto the said party of the second part, its successors and assigns forever, all the following described lot or parcel of land, situate, lying, and being in the county of Archuleta, and State of Colorado, to wit: The southeast quarter of the northwest quarter, and west half of the northwest quarter of section nine, and the northeast quarter of the northeast quarter of sec-

tion eight in township thirty-four north of range two west of New Mexico meridian, containing one hundred and sixty acres.

Together with all and singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof; and all the estate, right, title, interest, claim, and demand whatsoever of the said party of the first part, either in law or equity, of, in and to the above-bargained premises, with the hereditaments and appurtenances.

To have and to hold the said premises above bargained and described, with the appurtenances, unto the said party of the second part, its successors and assigns forever. And the said William H. Norton party of the first part, for himself and his heirs, executors and administrators, does covenant, grant, bargain, and agree to and with the said party of the second part, its successors and assigns, that at the time of the ensealing and delivery of these presents he is well seized of the premises above conveyed, as of good, sure, perfect, absolute, and indefeasible estate of inheritance, in law, in fee simple, and has good right, full power and lawful authority to grant, bargain, sell, and convey the same, in manner and form aforesaid, and that the same are free and clear from all former and other grants, bargains, sales, liens, taxes, assessments, and incumbrances of whatever kind or nature soever; and the above-bargained premises, in the quiet and peaceable possession of the said party of the second part, its successors and assigns, against all and every person or persons lawfully claiming or to claim the whole or any part thereof, the said party of the first part shall and will warrant and forever defend.

In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

W. H. NORTON. [SEAL.]

And so the grand jurors aforesaid, upon their oaths aforesaid, do say that the said Charles H. Freeman, Edgar M. Biggs, and Welch W. Nossaman, on the said thirtieth day of March, in the year nineteen hundred and one, and from thence hitherto, and at the several times of the committing of the said several overt acts in this indictment charged (the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, during all the time from the said day when the same was originally entered into, to wit, the said thirtieth day of March, in the year nineteen hundred and one, to the date of the presenting of this indictment, being still continuing and in existence), in manner and form in this indictment aforesaid, unlawfully, corruptly, wickedly, and maliciously did conspire, combine, confederate, and agree together, and with others, indirectly, deceitfully, and fraudulently to obtain from the said United States, for the said corporation, certain of the public lands and property of the said United States in quantity greatly in excess of the quantity which the said corporation could lawfully obtain directly from the said United States under a

proper and lawful administration of the said laws and regulations, and thereby, and in that manner, defraud the said United States of its valuable property in such lands, and also of its governmental function in the matter of preserving and disposing of the same lands, as well as out of its right to administer an intelligent and honest service in that behalf in the interests of the people of the said United States; against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided.

EARL M. CRANSTON,
United States Attorney.

(Endorsed:) No. 2027. United States District Court, District of Colorado. The United States of America v. Charles H. Freeman, Edgar M. Biggs, and Welch W. Nossaman. Indictment: Conspiracy to defraud the United States. R. S. 5440 as amended. A True Bill: E. D. Welker, foreman. Filed June 22, 1907. Charles W. Bishop, clerk.

27 Eighteenth day, November term. Monday, November 25th, A. D. 1907.

Present: The Honorable Robert E. Lewis, district judge, and other officers as noted on the fifth day of November, A. D. 1907.

THE UNITED STATES OF AMERICA *vs.* CHARLES H. FREEMAN, EDGAR M. Biggs, and Welch W. Nossaman. } 2027. Indictment for conspiracy to defraud United States.

At this day comes Earl M. Cranston, esquire, district attorney, who prosecutes the pleas of the United States in this behalf;

And thereupon it is ordered by the court that the defendants plead to the indictment herein at the incoming of the court on Monday, the second day of December, A. D. 1907, and that the clerk of this court serve a certified copy of this order upon each of the defendants by registered mail without delay.

In the District Court of the United States of America. For the District of Colorado sitting at Denver.

UNITED STATES OF AMERICA,
District of Colorado, ss:

THE UNITED STATES OF AMERICA, PLAINTIFF, *vs.*

28 CHARLES H. FREEMAN, EDGAR M. Biggs, and Welch W. Nossaman, defendants. } No. 2027. Demurrer.

And the said defendant Welch W. Nossaman, in his own proper person, comes into court here, and having heard read the said indict-

ment, heretofore and at the May term, A. D. 1907, of this honorable court found and filed against said defendant, does say that the said indictment, and the matters therein contained, in the manner and form as the same are above and in said indictment stated and set forth, are not sufficient in law as against said defendant Welch W. Nossaman, and that he, the said Welch W. Nossaman, is not bound by the law of the land to answer the same; and this said defendant Welch W. Nossaman is ready to verify; wherefore, for want of sufficient indictment in this behalf, the said defendant Welch W. Nossaman prays judgment, and that by the court he may be dismissed and discharged from the said premises in the said indictment specified.

And the said defendant Welch W. Nossaman, in his own proper person, further separately comes into court here, and having heard read the said indictment, heretofore and at the May term of this honorable court found and filed against said defendant, does say that the said indictment, and the matters therein contained, in the manner and form as the same are above and in said indictment stated and set forth, are not sufficient in law as against said defendant
29 Welch W. Nossaman, and that he, the said Welch W. Nossaman, is not bound by the law of the land to answer the same; and particularly said defendant Welch W. Nossaman says:

A. That said indictment does not charge or set forth any crime or offense or the commission of any crime or offense by the defendants herein, or either or any of them, known to, or recognized by, any statute or statutes or law of the United States.

B. That said indictment does not charge or allege facts sufficient to constitute any crime or offense or the commission of any crime or offense by the defendants herein, or either or any of them, within the meaning of section 5440 of the Revised Statutes of the United States or under any other statute or statutes of the United States, or at all, in that the formation of a conspiracy to commit an offense against the United States or to defraud the United States is not sufficiently set forth, or at all, nor the place and manner of forming the alleged conspiracy, or the place and manner in which, and at which the alleged conspiracy was entered into.

C. The said indictment is wholly insufficient in law, in that the averments and each of them, contained in said indictment touching the alleged timber character of the lands forming the subject-matter of the alleged conspiracy, together with the lands which are alleged to have been entered in pursuance thereof, amount merely to a statement of an opinion or theory, and do not amount to a statement
30 of the essential facts from which the actual character of said lands, or any of them, would appear.

D. That each and every general allegation contained in said indictment are mere statements of legal conclusions and fill no office other than obscuring the vital facts, and that taking the allegations in said indictment as a whole, it is manifest that the subject-matter of the supposed conspiracy does not in law involve a state of facts

sufficient to constitute a criminal conspiracy under the provisions of said section 5440 of the Revised Statutes of the United States.

E. That said indictment is too vague, indefinite, and uncertain to require the said defendant Welch W. Nossaman to plead or answer thereto, in that:

1. Said indictment wholly fails to allege, set out, or describe with sufficient certainty, or at all, the terms of the alleged conspiracy, combination, confederacy, and agreement by said indictment alleged to have been entered into between the said defendant and the other defendants and divers other persons to the said grand jurors unknown.

2. Said indictment wholly fails to allege, set out, or describe with sufficient certainty, or at all, the object of the alleged conspiracy, combination, confederacy and agreement of said defendant
31 with the other defendants and divers other persons to the said grand jurors unknown, on March 30th, 1901, or at any other time.

3. Said indictment wholly fails to allege, set out, or describe with sufficient certainty, or at all, that the object of the alleged conspiracy, combination, confederacy, and agreement of said defendant with the other defendants and divers other persons to the said grand jurors unknown, on March 30th, 1901, or at any other time, was to defraud the United States in any manner or for any purpose.

4. Said indictment wholly fails to allege, set out, or describe with sufficient certainty, or at all, that on said 30th day of March, A. D. 1901, or at any other time, said defendant, together with the other defendants and divers other persons to the said grand jurors unknown, did unlawfully, corruptly, wickedly, and maliciously conspire, combine, confederate, and agree together to commit any offense against the United States or to defraud the United States in any manner or for any purpose.

5. Said indictment wholly fails to allege or set out or describe with sufficient certainty, or at all, out of what right, title, or interest whatsoever of the United States in the said lands in said indictment described the defendant herein purposed to defraud the United States.

6. Said indictment wholly fails to allege or set out or
32 describe with sufficient certainty what timber lands of the United States the defendants herein, together with divers other persons to the said grand jurors unknown, purposed and conspired indirectly to obtain from the said United States for a certain corporation, to wit, The New Mexico Lumber Company, which the said corporation could not lawfully obtain directly from the said United States.

7. Said indictment wholly fails to allege or set out with sufficient certainty, or at all, the means by which it is claimed that the defendants herein, together with divers other persons to the said grand jurors unknown, purposed and conspired to defraud the United

States in any manner or for any purpose by indirectly obtaining from the United States for a certain corporation, to wit, The New Mexico Lumber Company, a large quantity of timber lands in excess of the quantity of such lands which the said corporation could lawfully obtain directly from the said United States.

8. Said indictment wholly fails to allege, set out, or describe with sufficient certainty, or at all, what " persons aforesaid " for hire and under agreements with them separately to that end, the defendants herein, in pursuance of said alleged conspiracy to obtain said timber lands, were to solicit and procure, to pay to the receiver of the said land office, with moneys to be furnished to them by the said
33 corporation, the price fixed by law for said timber lands, make entries as individual entrymen, secure patents from said United States and make conveyances thereof to the said corporation.

9. Said indictment wholly fails to allege or set out with sufficient certainty, or at all, under what circumstances or in what manner or proceeding the alleged conspirators were to solicit and procure " the persons aforesaid " to enter said lands, to pay the price and secure patents therefor, and to convey the same to said corporation.

10. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 1 on page 4 of said indictment referred to and designated as " testimony of claimant."

11. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 2 on page 5 of said indictment referred to and designated as " testimony of claimant."

12. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 3 on page 5 of said indictment referred to and designated as " testimony of claimant."

13. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain
34 document in paragraph numbered 4 on page 6 of said indictment referred to and designated as " testimony of claimant."

14. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 5 on page 7 of said indictment referred to and designated as " testimony of claimant."

15. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 6 on page 7 of said indictment referred to and designated as " testimony of claimant."

16. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 7 on page 8 of said indictment referred to and designated as " testimony of claimant."

17. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in

paragraph numbered 8 on page 9 of said indictment referred to and designated as "testimony of claimant."

18. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 9 on page 9 of said indictment referred to and designated as "testimony of claimant."

35 19. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 10 on page 10 of said indictment referred to and designated as "testimony of claimant."

20. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 11 on page 11 of said indictment referred to and designated as "testimony of claimant."

21. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 12 on page 11 of said indictment referred to and designated as "a patent for the lands described in overt act numbered 1."

22. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 13 on page 12 of said indictment referred to and designated as "a patent for the lands described in overt act numbered 2."

23. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 14 on page 12 of said indictment referred to and designated as "a patent for the lands described in overt

36 act numbered 3."

24. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 15 on page 12 of said indictment referred to and designated as "a patent for the lands described in overt act numbered 4."

25. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 16 on page 13 of said indictment referred to and designated as "a patent for the lands described in overt act numbered 5."

26. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 17 on page 13 of said indictment referred to and designated as "a patent for the lands described in overt act numbered 6."

27. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy, or certainty, or at all, that certain document in paragraph numbered 18 on page 13 of said indictment referred to and designated as "a patent for the lands described in overt act numbered 7."

28. Said indictment wholly fails to allege, set out, or de-
37 scribe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 19 on page 14 of said indictment referred to and designated as "a patent for the lands described in overt act numbered 8."

29. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 20 on page 14 of said indictment referred to and designated as "a patent for the lands described in overt act numbered 9."

30. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 21 on page 15 of said indictment referred to and designated as "a patent for the lands described in overt act numbered 10."

31. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 22 on page 15 of said indictment referred to and designated as "a patent for the lands described in overt act numbered 11."

32. It can not be determined from the allegations of said indictment whether the alleged conspiracy is claimed to be unlawful in the ends sought to be attained by said conspiracy or in the means whereby said alleged conspiracy was to be accomplished.

38 33. It does not appear from said indictment, and said indictment wholly fails to allege, set out, and show that the alleged overt acts and each of them in paragraphs numbered 1 on page 4, 2 on pages 4 and 5, 3 on pages 5 and 6, 4 on page 6, 5 on pages 6 and 7, 6 on pages 7 and 8, 7 on page 8, 8 on pages 8 and 9, 9 on pages 9 and 10, 10 on page 10, 11 on pages 10 and 11, 12 on page 11, 13 on pages 11 and 12, 14 on page 12, 15 on page 12, 16 on page 13, 17 on page 13, 18 on pages 13 and 14, 19 on page 14, 20 on page 14, 21 on pages 14 and 15, 22 on page 15, 23 on pages 15, 16, and 17, 24 on pages 17, 18, and 19, respectively, of said indictment charged, alleged, and described was an or any act done, induced, caused, or procured to be done by the said defendants or said conspirators or any one or more of them in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederacy, and agreement, and to effect the object of the same, in said indictment set forth and described, or an or any act contemplated in said original conspiracy to be done, induced, caused, or procured to be done by said defendants or said conspirators or any one or more of them in pursuance thereof.

F. That said indictment is too vague, indefinite, and uncertain, and fails to inform said defendant Welch W. Nossaman of the cause and nature of the accusation against him, as required by Arti-
39 cle VI of the amendments to the Constitution of the United States, in that:

1. Said indictment wholly fails to allege, set out, or describe with sufficient certainty, or at all, the terms of the alleged conspiracy,

combination, confederacy, and agreement by said indictment alleged to have been entered into between the said defendant and the other defendants and divers other persons to the said grand jurors unknown.

2. Said indictment wholly fails to allege, set out, or describe with sufficient certainty, or at all, the object of the alleged conspiracy, combination, confederacy, and agreement of said defendant with the other defendants and divers other persons to the said grand jurors unknown, on March 30th, 1901, or at any other time.

3. Said indictment wholly fails to allege, set out, or describe with sufficient certainty, or at all, that the object of the alleged conspiracy, combination, confederacy, and agreement of said defendant with the other defendants and divers other persons to the said grand jurors unknown, on March 30th, 1901, or at any other time, was to defraud the United States in any manner or for any purpose.

4. Said indictment wholly fails to allege, set out, or describe with sufficient certainty, or at all, that on said 30th day of March, A. D. 1901, or at any other time, said defendant, together with the other defendants and divers other persons to the said grand jurors
40 unknown, did unlawfully, corruptly, wickedly, and maliciously conspire, combine, confederate, and agree together to commit any offense against the United States or to defraud the United States in any manner or for any purpose.

5. Said indictment wholly fails to allege or set out or describe with sufficient certainty, or at all, out of what right, title, or interest whatsoever of the United States in the said lands in said indictment described the defendant therein purposed to defraud the United States.

6. Said indictment wholly fails to allege or set out or describe with sufficient certainty what timber lands of the United States the defendants herein, together with divers other persons to the said grand jurors unknown, purposed and conspired indirectly to obtain from the said United States for a certain corporation, to wit, The New Mexico Lumber Company, which the said corporation could not lawfully obtain directly from the said United States.

7. Said indictment wholly fails to allege or set out with sufficient certainty, or at all, the means by which it is claimed that the defendants herein, together with divers other persons to the said grand jurors, unknown, purposed and conspired to defraud the United States in any manner or for any purpose by indirectly obtaining from the United States for a certain corporation, to wit, The
41 New Mexico Lumber Company, a large quantity of timber lands in excess of the quantity of such lands which the said corporation could lawfully obtain directly from the said United States.

8. Said indictment wholly fails to allege, set out, or describe with sufficient certainty, or at all, what "persons aforesaid" for hire and under agreements with them separately to that end, the defendants herein, in pursuance of said alleged conspiracy to obtain said timber

lands, were to solicit and procure, to pay to the receiver of the said land office, with moneys to be furnished to them by the said corporation, the price fixed by law for said timber lands, make entries as individual entrymen, secure patents from said United States and make conveyances thereof to the said corporation.

9. Said indictment wholly fails to allege or set out with sufficient certainty, or at all, under what circumstances or in what manner or proceeding the alleged conspirators were to solicit and procure "the persons aforesaid" to enter said lands, to pay the price and secure patents therefor, and to convey the same to said corporation.

10. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 1 on page 4 of said indictment referred to and designated as "testimony of claimant."

11. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain docu-
42 ment in paragraph numbered 2 on page 5 of said indictment referred to and designated as "testimony of claimant."

12. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 3 on page 5 of said indictment referred to and designated as "testimony of claimant."

13. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 4 on page 6 of said indictment referred to and designated as "testimony of claimant."

14. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 5 on page 7 of said indictment referred to and designated as "testimony of claimant."

15. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 6 on page 7 of said indictment referred to and designated as "testimony of claimant."

16. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 7 on page 8 of said indictment referred to and designated as "testimony of claimant."

17. Said indictment wholly fails to allege, set out, or de-
43 scribe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 8 on page 9 of said indictment referred to and designated as "testimony of claimant."

18. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 9 on page 9 of said indictment referred to and designated as "testimony of claimant."

19. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in

paragraph numbered 10 on page 10 of said indictment referred to and designated as "testimony of claimant."

20. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 11 on page 11 of said indictment referred to and designated as "testimony of claimant."

21. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 12 on page 11 of said indictment referred to and designated as "a patent for the lands described in overt act numbered 1."

22. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 13 on page 12 of said indictment referred
44 to and designated as "a patent for the lands described in overt act numbered 2."

23. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 14 on page 12 of said indictment referred to and designated as "a patent for the lands described in overt act numbered 3."

24. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 15 on page 12 of said indictment referred to and designated as "a patent for the lands described in overt act numbered 4."

25. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 16 on page 13 of said indictment referred to and designated as "a patent for the lands described in overt act numbered 5."

26. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 17 on page 13 of said indictment referred to and designated as "a patent for the lands described in overt act numbered 6."

45 27. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 18 on page 13 of said indictment referred to and designated as "a patent for the lands described in overt act numbered 7."

28. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 19 on page 14 of said indictment referred to and designated as "a patent for the lands described in overt act numbered 8."

29. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 20 on page 14 of said indictment referred to

and designated as "a patent for the lands described in overt act numbered 9."

30. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 21 on page 15 of said indictment referred to and designated as "a patent for the lands described in overt act numbered 10."

31. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 22 on page 15 of said indictment referred
46 to and designated as "a patent for the lands described in overt act numbered 11."

32. It can not be determined from the allegations of said indictment whether the alleged conspiracy is claimed to be unlawful in the ends sought to be attained by said conspiracy or in the means whereby said alleged conspiracy was to be accomplished.

33. It does not appear from said indictment, and said indictment wholly fails to allege, set out, and show that the alleged overt acts and each of them in paragraphs numbered 1 on page 4, 2 on pages 4 and 5, 3 on pages 5 and 6, 4 on page 6, 5 on pages 6 and 7, 6 on pages 7 and 8, 7 on page 8, 8 on pages 8 and 9, 9 on pages 9 and 10, 10 on page 10, 11 on pages 10 and 11, 12 on page 11, 13 on pages 11 and 12, 14 on page 12, 15 on page 12, 16 on page 13, 17 on page 13, 18 on pages 13 and 14, 19 on page 14, 20 on page 14, 21 on pages 14 and 15, 22 on page 15, 23 on pages 15, 16, and 17, 24 on pages 17, 18, and 19, respectively, of said indictment charged, alleged, and described was an or any act done, induced, caused, or procured to be done by the said defendants or said conspirators or any one or more of them in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederacy, and agreement, and to effect the object of the same, in said indictment set forth and described, or an or any act contemplated in said original conspiracy to be done, induced, caused, or procured to be done by said de-
47 fendants or said conspirators or any one or more of them in pursuance thereof.

Wherefore, for want of sufficient indictment in this behalf, the said defendant Welch W. Nossaman prays judgment and that he by the court may be dismissed and discharged from the said premises in the said indictment specified.

CLYDE C. DAWSON,
CHARLES J. HUGHES, JR.,
Attorneys for Welch W. Nossaman, defendant.

(Endorsed:) Court No. 2027. Div. In the District Court. District of Colorado. The United States of America, plaintiff, vs. Charles H. Freeman et al., defendants. Demurred of Welch W. Nossaman. Filed Dec. 2, 1907. Charles W. Bishop, clerk. Charles J. Hughes, jr., Clyde C. Dawson, attorneys for defendants.

In the District Court of the United States of America for the District of Colorado sitting at Denver

UNITED STATES OF AMERICA,
District of Colorado, ss.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
CHARLES H. FREEMAN, EDGAR M. BIGGS AND Welch W. Nossaman, defendants.
No. 2027. Demurrer.

And the said defendants Charles H. Freeman and Edgar M. Biggs, in their own proper persons, severally come into court here and having heard read the said indictment, heretofore and at the May term, A. D. 1907, of this honorable court found and filed against said defendants, do severally say that the said indictment, and the matters therein contained, in the manner and form as the same are above and in said indictment stated and set forth, are not sufficient in law as against said defendants Charles H. Freeman and Edgar M. Biggs, and each of them, and that they, the said Charles H. Freeman and Edgar M. Biggs, are not, and that each of them is not, bound by the law of the land to answer the same; and this said defendants Charles H. Freeman and Edgar M. Biggs are, and each of them is, ready to verify; wherefore for want of sufficient indictment in this behalf the said defendants Charles H. Freeman and Edgar M. Biggs pray, and each of them prays, judgment, and that by the court they, each of them, may be dismissed and discharged from the said premises in the said indictment specified.

48

And the said defendants Charles H. Freeman and Edgar M. Biggs, in their own proper person, further severally come into court here, and having heard read the said indictment, heretofore and at the May term of this honorable court found and filed against said defendants, do severally say that the said indictment, and the matters therein contained, in the manner and form as the same are above and in said indictment stated and set forth, are not sufficient in law as against said defendants Charles H. Freeman and Edgar M. Biggs, and each of them, and that they, the said Charles H. Freeman and Edgar M. Biggs, are not, and that each of them is not, bound by the law of the land to answer the same; and particularly said defendants Charles H. Freeman and Edgar M. Biggs, say, and each of them says:

49

A. That said indictment does not charge or set forth any crime or offense or the commission of any crime or offense by the defendants herein, or either or any of them, known to, or recognized by, any statute or statutes or law of the United States.

B. That said indictment does not charge or allege facts sufficient to constitute any crime or offense or the commission of any crime or offense by the defendants herein, or either or any of them, within the meaning of section 5440 of the Revised Statutes of the United

States or under any other statute or statutes of the United States, or at all, in that the formation of a conspiracy to commit an offense against the United States or to defraud the United States is not sufficiently set forth, or at all, nor the place and manner of forming the alleged conspiracy, or the place and manner in which, and at which the alleged conspiracy was entered into.

C. The said indictment is wholly insufficient in law, in that
50 the averments and each of them, contained in said indictment touching the alleged timber character of the lands forming the subject-matter of the alleged conspiracy, together with the lands which are alleged to have been entered in pursuance thereof, amount merely to a statement of an opinion or theory, and do not amount to a statement of the essential facts from which the actual character of said lands, or any of them, would appear.

D. That each and every general allegation contained in said indictment are mere statements or legal conclusions and fill no office other than obscuring the vital facts, and that taking the allegations in said indictment as a whole it is manifest that the subject-matter of the supposed conspiracy does not in law involve a state of facts sufficient to constitute a criminal conspiracy under the provisions of said section 5440 of the Revised Statutes of the United States.

E. That said indictment is too vague, indefinite and uncertain to require the said defendants Charles H. Freeman, and Edgar M. Biggs, or either of them, to plead or answer thereto, in that:

1. Said indictment wholly fails to allege, set out, or describe with sufficient certainty, or at all, the terms of the alleged conspiracy, combination, confederacy, and agreement by said indictment alleged to have been entered into between the said defendants and
51 the other defendant and divers other persons to the said grand jurors unknown.

2. Said indictment wholly fails to allege, set out, or describe with sufficient certainty, or at all, the object of the alleged conspiracy, combination, confederacy, and agreement of said defendants with the other defendant and divers other persons to the said grand jurors unknown, on March 30th, 1901, or at any other time.

3. Said indictment wholly fails to allege, set out, or describe with sufficiently certainty, or at all, that the object of the alleged conspiracy, combination, confederacy, and agreement of said defendants with the other defendant and divers other persons to the said grand jurors unknown, on March 30th, 1901, or at any other time, was to defraud the United States in any manner or for any purpose.

4. Said indictment wholly fails to allege, set out, or describe with sufficient certainty, or at all, that on said 30th day of March, A. D. 1901, or at any other time, said defendants, together with the other defendant and divers other persons to the said grand jurors unknown, did unlawfully, corruptly, wickedly, and maliciously conspire, combine, confederate, and agree together to commit any offense against the United States or to defraud the United States in any manner or for any purpose.

5. Said indictment wholly fails to allege or set out or de-
52 scribe with sufficient certainty, or at all, out of what right, title, or interest whatsoever of the United States in the said lands in said indictment described the defendants herein purposed to defraud the United States.

6. Said indictment wholly fails to allege or set out or describe with sufficient certainty what timber lands of the United States the defendants herein, together with divers other persons to the said grand jurors unknown, purposed and conspired indirectly to obtain from the said United States for a certain corporation, to wit, The New Mexico Lumber Company, which the said corporation could not lawfully obtain directly from the said United States.

7. Said indictment wholly fails to allege or set out with sufficient certainty, or at all, the means by which it is claimed that the defendants herein together with divers other persons to the said grand jurors unknown, purposed and conspired to defraud the United States in any manner or for any purpose by indirectly obtaining from the United States for a certain corporation, to wit, The New Mexico Lumber Company, a large quantity of timber lands in excess of the quantity of such lands which the said corporation could lawfully obtain directly from the said United States.

8. Said indictment wholly fails to allege, set out, or describe with sufficient certainty, or at all, what "persons aforesaid" for
53 hire and under agreement with them separately to that end, the defendants herein, in pursuance of said alleged conspiracy to obtain said timber lands, were to solicit and procure, to pay to the receiver of the said land office, with moneys to be furnished to them by the said corporation, the price fixed by law for the said timber lands, make entries as individual entrymen, secure patents from said United States and make conveyances thereof to the said corporation.

9. Said indictment wholly fails to allege or set out with sufficient certainty, or at all, under what circumstances or in what manner or proceeding the alleged conspirators were to solicit and procure "the persons aforesaid" to enter said lands, to pay the price and secure patents therefor, and to convey the same to said corporation.

10. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 1 on page 4 of said indictment referred to and designated as "testimony of claimant."

11. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 2 on page 5 of said indictment referred to and designated as "testimony of claimant."

12. Said indictment wholly fails to allege, set out, or de-
54 scribe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 3 on page 5 of said indictment referred to and designated as "testimony of claimant."

13. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in

paragraph numbered 4 on page 6 of said indictment referred to and designated as "testimony of claimant."

14. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 5 on page 7 of said indictment referred to and designated as "testimony of claimant."

15. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 6 on page 7 of said indictment referred to and designated as "testimony of claimant."

16. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 7 on page 8 of said indictment referred to and designated as "testimony of claimant."

17. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 8 on page 9 of said indictment referred to and designated as "testimony of claimant."

55 18. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 9 on page 9 of said indictment referred to and designated as "testimony of claimant."

19. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 10 on page 10 of said indictment referred to and designated as "testimony of claimant."

20. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 11 on page 11 of said indictment referred to and designated as "testimony of claimant."

21. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 12 on page 11 of said indictment referred to and designated as "a patent for the lands described in overt act numbered 1."

22. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 13 on page 12 of said indictment referred to and designated as "a patent for the lands described in overt act numbered 2."

56 23. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 14 on page 12 of said indictment referred to and designated as "a patent for the lands described in overt act numbered 3."

24. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 15 on page 12 of said indictment referred to

and designated as "a patent for the lands described in overt act numbered 4."

25. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 16 on page 13 of said indictment referred to and designated as "a patent for the lands described in overt act numbered 5."

26. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 17 on page 13 of said indictment referred to and designated as "a patent for the lands described in overt act numbered 6."

27. Said indictment wholly fails to allege, set out, or describe
57 with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 18 on page 13 of said indictment referred to and designated as "a patent for the lands described in overt act numbered 7."

28. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 19 on page 14 of said indictment referred to and designated as "a patent for the lands described in overt act numbered 8."

29. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 20 on page 14 of said indictment referred to and designated as "a patent for the lands described in overt act numbered 9."

30. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 21 on page 15 of said indictment referred to and designated as "a patent for the lands described in overt act numbered 10."

31. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 22 on page 15 of said indictment referred to and designated as "a patent for the lands described in overt
58 act numbered 11."

32. It can not be determined from the allegations of said indictment whether the alleged conspiracy is claimed to be unlawful in the ends sought to be attained by said conspiracy or in the means whereby said alleged conspiracy was to be accomplished.

33. It does not appear from said indictment, and said indictment wholly fails to allege, set out, and show that the alleged overt acts and each of them in paragraphs numbered 1 on page 4, 2 on pages 4 and 5, 3 on pages 5 and 6, 4 on page 6, 5 on pages 6 and 7, 6 on pages 7 and 8, 7 on page 8, 8 on pages 8 and 9, 9 on pages 9 and 10, 10 on page 10, 11 on pages 10 and 11, 12 on page 11, 13 on pages 11 and 12, 14 on page 12, 15 on page 12, 16 on page 13, 17 on page 13, 18 on pages 13 and 14, 19 on page 14, 20 on page 14, 21 on pages 14 and

15, 22 on page 15, 23 on pages 15, 16, and 17, 24 on pages 17, 18, and 19, respectively, of said indictment charged, alleged, and described was an or any act done, induced, caused, or procured to be done by the said defendants or said conspirators or any one or more of them in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederacy, and agreement and to effect the object of the same, in said indictment set forth and described, or an or any act contemplated in said original conspiracy to be done, induced, caused, or procured to be done by said defendants or said conspirators or any one or more of them in pursuance thereof.

59 F. That said indictment is too vague, indefinite, and uncertain and fails to inform said defendants, Charles H. Freeman and Edgar M. Biggs, or either of them, of the cause and nature of the accusation against them as required by Article VI of the amendments to the Constitution of the United States, in that:

1. Said indictment wholly fails to allege, set out, or describe with sufficient certainty, or at all, the terms of the alleged conspiracy, combination, confederacy, and agreement by said indictment alleged to have been entered into between the said defendants and the other defendant and divers other persons to the said grand jurors unknown.

2. Said indictment wholly fails to allege, set out, or describe with sufficient certainty, or at all, the object of the alleged conspiracy, combination, confederacy, and agreement of said defendants with the other defendant and divers other persons to the said grand jurors unknown, on March 30th, 1901, or at any other time.

3. Said indictment wholly fails to allege, set out, or describe with sufficient certainty, or at all, that the object of the alleged conspiracy, combination, confederacy, and agreement of said defendants with the other defendant and divers other persons to the said grand jurors unknown, on March 30th, 1901, or at any other time, was to defraud the United States in any manner or for any purpose.

4. Said indictment wholly fails to allege, set out, or describe
60 with sufficient certainty, or at all, that on said 30th day of March, A. D. 1901, or at any other time, said defendants, together with the other defendant and divers other persons to the said grand jurors unknown, did unlawfully, corruptly, wickedly, and maliciously conspire, combine, confederate, and agree together to commit any offense against the United States or to defraud the United States in any manner or for any purpose.

5. Said indictment wholly fails to allege or set out or describe with sufficient certainty, or at all, out of what right, title, or interest whatsoever of the United States in the said lands in said indictment described the defendants herein purposed to defraud the United States.

6. Said indictment wholly fails to allege or set out or describe with sufficient certainty what timber lands of the United States the defendants herein, together with divers other persons to the said grand jurors unknown, purposed and conspired indirectly to obtain from the said United States for a certain corporation, to wit, The New

Mexico Lumber Company, which the said corporation could not lawfully obtain directly from the said United States.

7. Said indictment wholly fails to allege or set out with sufficient certainty, or at all, the means by which it is claimed that the defendants herein, together with divers other persons to the said
61 grand jurors unknown, purposed and conspired to defraud the United States in any manner or for any purposes by indirectly obtaining from the United States for a certain corporation, to wit, The New Mexico Lumber Company, a large quantity of timber lands in excess of the quantity of such lands which the said corporation could lawfully obtain directly from the said United States.

8. Said indictment wholly fails to allege, set out, or describe with sufficient certainty, or at all, what " persons aforesaid " for hire and under agreements with them separately to that end, the defendants herein, in pursuance of said alleged conspiracy to obtain said timber lands, were to solicit and procure, to pay to the receiver of the said land office, with moneys to be furnished to them by the said corporation, the price fixed by law for said timber lands, make entries as individual entrymen, secure patents from said United States, and make conveyances thereof to the said corporation.

9. Said indictment wholly fails to allege or set out with sufficient certainty, or at all, under what circumstances or in what manner or proceeding the alleged conspirators were to solicit and procure " the persons aforesaid " to enter said lands, to pay the price and secure patents therefor, and to convey the same to said corporation.

10. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 1 on page 4 of said indictment referred to and designated as "testimony of claimant."

62 11. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 2 on page 5 of said indictment referred to and designated as " testimony of claimant."

12. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 3 on page 5 of said indictment referred to and designated as " testimony of claimant."

13. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 4 on page 6 of said indictment referred to and designated as " testimony of claimant."

14. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 5 on page 7 of said indictment referred to and designated as " testimony of claimant."

15. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 6 on page 7 of said indictment referred to and designated as " testimony of claimant."

16. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document
63 in paragraph numbered 7 on page 8 of said indictment referred to and designated as "testimony of claimant."

17. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 8 on page 9 of said indictment referred to and designated as "testimony of claimant."

18. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 9 on page 9 of said indictment referred to and designated as "testimony of claimant."

19. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 10 on page 10 of said indictment referred to and designated as "testimony of claimant."

20. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 11 on page 11 of said indictment referred to and designated as "testimony of claimant."

21. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 12 on page 11 of said indictment referred to and designated as "a patent for the lands described in overt act numbered 1."

64 22. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 13 on page 12 of said indictment referred to and designated as "a patent for the lands described in overt act numbered 2."

23. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 14 on page 12 of said indictment referred to and designated as "a patent for the lands described in overt act numbered 3."

24. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 15 on page 12 of said indictment referred to and designated as "a patent for the lands described in overt act numbered 4."

25. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 16 on page 13 of said indictment referred to and designated as "a patent for the lands described in overt act numbered 5."

26. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain docu-
65 ment in paragraph numbered 17 on page 13 of said indictment referred to and designated as "a patent for the lands described in overt act numbered 6."

27. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 18 on page 13 of said indictment referred to and designated as "a patent for the lands described in overt act numbered 7."

28. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 19 on page 14 of said indictment referred to and designated as "a patent for the lands described in overt act numbered 8."

29. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 20 on page 14 of said indictment referred to and designated as "a patent for the lands described in overt act numbered 9."

30. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 21 on page 15 of said indictment referred to and designated as "a patent for the lands described in overt act numbered 10."

66 31. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 22 on page 15 of said indictment referred to and designated as "a patent for the lands described in overt act numbered 11."

32. It can not be determined from the allegations of said indictment whether the alleged conspiracy is claimed to be unlawful in the ends sought to be attained by said conspiracy or in the means whereby said alleged conspiracy was to be accomplished.

33. It does not appear from said indictment, and said indictment wholly fails to allege, set out, and show that the alleged overt acts and each of them in paragraphs numbered 1 on page 4, 2 on pages 4 and 5, 3 on pages 5 and 6, 4 on page 6, 5 on pages 6 and 7, 6 on pages 7 and 8, 7 on page 8, 8 on pages 8 and 9, 9 on pages 9 and 10, 10 on page 10, 11 on pages 10 and 11, 12 on page 11, 13 on pages 11 and 12, 14 on page 12, 15 on page 12, 16 on page 13, 17 on page 13, 18 on pages 13 and 14, 19 on page 14, 20 on page 14, 21 on pages 14 and 15, 22 on page 15, 23 on pages 15, 16, and 17, 24 on pages 17, 18, and 19, respectively, of said indictment charged, alleged, and described was an or any act done, induced, caused, or procured to be done by the said defendants or said conspirators or any one or more of them in pursuance of the said unlawful, corrupt, wicked, malicious con-

67 spiracy, combination, confederacy, and agreement, and to effect the object of the same, in said indictment set forth and described, or an or any act contemplated in said original conspiracy to be done, induced, caused, or procured to be done by said defendants or said conspirators or any one or more of them in pursuance thereof.

G. That it does not appear that the said indictment was found or filed, and said indictment was not found or filed in this or in any

court within three years next after the alleged offense and offenses set forth and alleged in said indictment are alleged to have been committed; nor within three years next after the commission of any offense in said indictment specified, though during the whole time since the alleged commission of said alleged offenses said defendants, Charles H. Freeman and Edgar M. Biggs have never, and each of them has never, fled from justice, and are not, and is not, now fleeing from justice, and this the said defendants Charles H. Freeman and Edgar M. Biggs are, and each of them is, ready to verify.

Wherefore, for want of sufficient indictment in this behalf, the said defendants Charles H. Freeman and Edgar M. Biggs pray, and each of them prays, judgment and that by the court they, and each of them, may be dismissed and discharged from the said premises in the said indictment specified.

CLYDE C. DAWSON,
CHARLES J. HUGHES, JR.,
68 *Attorneys for Charles H. Freeman and Edgar M. Biggs.*

STATE OF COLORADO,
City and County of Denver, ss:

Charles H. Freeman, being first duly sworn, upon oath deposes and says:

That he is one of the defendants above named; that he has heard read the foregoing demurrer and knows the contents thereof, and that the statements of facts therein made and contained are true of his own knowledge.

CHARLES H. FREEMAN.

Subscribed and sworn to before me this 30th day of November, A. D. 1907.

My commission expires January 25th, 1909.

[Notarial seal.] WILLIAM W. HEINEMANN,
Notary Public.

STATE OF COLORADO,
City and County of Denver, ss:

Edgar M. Biggs, being first duly sworn, upon oath deposes and says:

69 That he is one of the defendants above named; that he has heard read the foregoing demurrer and knows the contents thereof, and that the statements of facts therein made and contained are true of his own knowledge.

EDGAR M. BIGGS.

Subscribed and sworn to before me this 30th day of November, A. D. 1907.

My commission expires January 25, 1909.

[Notarial seal.] WILLIAM W. HEINEMANN,
Notary Public.

(Endorsed:) Court No. 2027. Div. In the District Court, District of Colorado. The United States of America, plaintiff, vs. Charles H. Freeman et al., defendants. Demurrer of Charles H. Freeman and Edgar M. Biggs. Filed Dec. 2, 1907, Charles W. Bishop, clerk. Charles J. Hughes, jr., Clyde C. Dawson, attorneys for defendants.

In the District Court of the United States of America for the District of Colorado sitting at Denver.

UNITED STATES OF AMERICA,
District of Colorado, ss:

70 THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
CHARLES H. FREEMAN, EDGAR M. BIGGS, AND WELCH W. NOSSAMAN, defendants.
} No. 2027. Motion to quash.

And now comes the defendant Welch W. Nossaman, in his own proper person, into court here, and having heard read the said indictment heretofore and at the May term, A. D. 1907, of this honorable court found and filed against said defendants, does move the court to quash the said indictment and dismiss this cause against said defendant for the reason, as said defendant alleges the facts to be and as appear as matters of record in this court of which this court takes judicial cognizance, that the grand jurors by whom said indictment was made and presented were not regularly or legally summoned, empaneled, and sworn as required by the laws of the United States governing such procedure, in this, to wit: That at the November (1906) term of this court, on the 24th day of April, A. D. 1907, the grand jury was ordered to be summoned from certain counties named in the order, and the clerk of this court, in the presence of the United States marshal of the District of Colorado, was ordered to draw by chance from the jury box the names of twenty-three
71 persons, residents of the counties of Colorado named in said order, and to summon them to appear on Tuesday, the 14th day of May, A. D. 1907, at ten o'clock a. m. under a venire facias made returnable on that day. Thereupon the names of twenty-three persons were drawn by the said clerk, such names being fully set forth in the records of this court at page 350.

Thereafter and on the 14th day of May, A. D. 1907, the United States marshal of the District of Colorado made return of the venire facias aforesaid, showing that thereunder he had summoned twenty-one of the men to serve as said grand jurors. That the twenty-one individuals so summoned appeared on the return day aforesaid, and for good and sufficient reasons to the court appearing, seven of said number were excused from further attendance upon the court at that term, leaving less than sixteen, to wit: Fourteen of the individuals originally summoned. Thereafter upon these facts appearing to the

court, a special venire facias was issued on said day commanding the said marshal to summon seven good and lawful men to attend and serve as grand jurors until discharged, which said venire facias was made returnable on said 14th day of May, A. D. 1907, at two o'clock p. m. That thereafter the said marshal under said special venire facias, without drawing further names from the box, summoned from the city and county of Denver seven men whose names appear at page 415 of the records of this court. That the summoning
72 of said seven individuals under the said special venire facias was contrary to law and the rules of this court. That the said individuals so summoned appeared, were duly sworn and empaneled with the fourteen individuals of the original panel, and the twenty-one individuals so summoned, empaneled and sworn constituted the grand jury which returned the said indictment herein.

CLYDE C. DAWSON,
CHARLES J. HUGHES, JR.,
Attorneys for Defendant Welch W. Nosseman.

(Endorsed:) Court No. 2027. In the District Court, District of Colorado. The United States of America, plaintiff, vs. Charles H. Freeman et al., defendants. Motion to quash of Welch W. Nosseman. Filed Dec. 2, 1907, Charles W. Bishop, clerk. Charles J. Hughes, jr., Clyde C. Dawson, attorneys for defendants.

In the District Court of the United States of America for the District of Colorado sitting at Denver.

UNITED STATES OF AMERICA,
District of Colorado, ss:

THE UNITED STATES OF AMERICA, PLAINTIFF, *vs.* CHARLES H. FREEMAN, EDGAR M. BIGGS AND Welch W. Nossaman, defendants.	No. 2027. Motion to quash.

73 And now comes the defendant Edgar M. Biggs and Charles H. Freeman, in their own proper persons, severally, into court here, and having heard read the said indictment heretofore and at the May term, A. D. 1907, of this honorable court found and filed against said defendants, do severally move the court to quash the said indictment and dismiss this cause against said defendants for the reason, as said defendants allege the facts to be and as appear as matters of record in this court of which this court takes judicial cognizance, that the grand jurors by whom said indictment was made and presented were not regularly or legally summoned, empaneled, and sworn as required by the laws of the United States governing such procedure in this, to wit: That at the November (1906) term of this court, on the 24th day of April, A. D. 1907, the grand jury was ordered to be summoned from certain counties named in the order, and the clerk of this court, in the presence of the United States marshal of the District of Colorado, was ordered to draw by chance from the jury box the names of twenty-three persons, residents of the counties of Colorado named in said order, and to summon them to

appear on Tuesday the 14th day of May, A. D. 1907, at ten o'clock a. m., under a venire facias made returnable on that day. Thereupon the names of twenty-three persons were drawn by the said clerk, such names being fully set forth in the records of this court
74 at page 350.

Thereafter and on the 14th day of May, A. D. 1907, the United States marshal of the District of Colorado made return of the venire facias aforesaid, showing that thereunder he had summoned twenty-one of the men to serve as said grand jurors. That the twenty-one individuals so summoned appeared on the return day aforesaid, and for good and sufficient reasons to the court appearing, seven of said number were excused from further attendance upon the court at that term, leaving less than sixteen, to wit: Fourteen of the individuals originally summoned. Thereafter upon these facts appearing to the court, a special venire facias was issued on said day commanding the said marshal to summon seven good and lawful men to attend and serve as grand jurors until discharged, which said venire facias was made returnable on said 14th day of May, A. D. 1907, at two o'clock p. m. That thereafter the said marshal under said special venire facias, without drawing further names from the box, summoned from the city and county of Denver seven men whose names appear at page 415 of the records of this court. That the summoning of said seven individuals under the said special venire facias was contrary to law and the rules of this court. That the said individuals so summoned appeared, were duly sworn and empaneled with the fourteen individuals of the original panel, and the twenty-one indi-
75 viduals so summoned, empaneled, and sworn constituted the grand jury which returned the said indictment herein.

CLYDE C. DAWSON,
CHARLES J. HUGHES, Jr.,
Attorneys for defendants, Edgar M. Biggs and Charles H. Freeman.

(Endorsed:) Court No. 2027. In the District Court, District of Colorado. The United States of America, plaintiff, vs. Charles H. Freeman et al., defendants. Motion to quash of Charles H. Freeman and Edgar M. Biggs. Filed Dec. 2, 1907, Charles W. Bishop, clerk. Charles J. Hughes, jr., Clyde C. Dawson, attorneys for defendants.

In the District Court of the United States of America for the District of Colorado, sitting at Denver.

UNITED STATES OF AMERICA,
District of Colorado, ss:

76	UNITED STATES OF AMERICA, PLAINTIFF, vs. CHARLES H. FREEMAN, EDGAR M. BIGGS, and WELCH W. NOSSAMAN, defendants.	No. 2027. Plea.

And the said defendant Welch W. Nossaman, in his own proper person, comes into court here and having heard read the said indict-

ment heretofore and at the May term, A. D. 1907, of this honorable court found and filed against said defendant, does say that the said indictment and the matters therein contained in the manner and form as the same are above and in said indictment stated and set forth, are not sufficient in law as against said defendant Welch W. Nossaman, and that he, the said Welch W. Nossaman, is not bound by the law of the land to answer the same, and particularly said Welch W. Nossaman says:

1. That said indictment does not allege that the alleged conspiracy therein mentioned or attempted to be set forth was formed within three years before the return of filing of the said indictment.

2. That the said indictment shows upon its face that the alleged conspiracy therein mentioned and attempted to be set forth was formed and overt acts committed thereunder more than three years before the return or filing of said indictment.

77 3. That the said prosecution against the said defendant and said alleged offense is barred by the statute of limitations of three years in such cases made and provided.

4. That it does not appear that said indictment was found or filed, and said indictment was not found or filed in this or any court within three years next after the alleged offense and offenses set forth and alleged in said indictment here alleged to have been committed, nor within three years next after the commission of any alleged offense in said indictment specified.

The said defendant Welch W. Nossaman, in support of, and as a part of, said plea that the said indictment was not found or returned in this or in any court within three years next after the alleged offense was committed, and in support of his claim that the prosecution thereof is barred by the statute of limitations, further says:

That during all the time mentioned in said indictment and at the time first mentioned therein, to wit, March 30th, A. D. 1901, and ever since that time, the said defendant has been a citizen and resident of the State of Colorado, and has during said entire period of time resided and lived and actually been in the State of Colorado, and has never been, and is not now, a fugitive from justice in any

78 way, nor has he ever at any time fled, nor is he now fleeing from justice, and that his whereabouts in the State of Colorado have never been concealed, and were and are well known to the people of the State of Colorado and to prosecuting officers of the United States Government; and said defendant further says that he has never at any time left the District of Colorado for the purpose of avoiding arrest, and he could have been easily apprehended or arrested had an indictment been found against him at any time since said 30th day of March, 1901; and said defendant further states that no information or criminal complaint or indictment of any kind was ever filed against him, and that he was not arrested until after the return of the indictment in this cause, which was returned on the 22nd day of June, A. D. 1907; and this the defendant Welch W. Nossaman is ready to verify.

Wherefore, for want of sufficient indictment in this behalf, the said defendant Welch W. Nossaman prays judgment, and that by the court he may be dismissed and discharged from the premises in the said indictment specified.

CLYDE C. DAWSON,
CHARLES J. HUGHES, JR.,
Attorneys for Welch W. Nossaman.

STATE OF COLORADO,
City and county of Denver, ss:

79 Welch W. Nossaman, being first duly sworn, upon oath deposes and says:

That he is one of the defendants above named; that he has read the foregoing plea and knows the contents thereof, and that the statements of facts therein made and contained are true of his own knowledge.

Subscribed and sworn to before me this day of , A. D. 1907.

My commission expires , 19 .

Notary Public.

(Endorsed:) Court No. 2027. In the District Court, District of Colorado. United States of America, plaintiff, vs. Chas. H. Freeman, Edgar M. Biggs, and W. W. Nossaman, defendants. Plea of Welch W. Nossaman. Filed December 10th, 1907, Charles W. Bishop, clerk. Charles J. Hughes, jr., Clyde C. Dawson, attorney for defendants.

Thirtieth day, November term, Tuesday, December 10th, A. D. 1907.

Present: The honorable Robert E. Lewis, district judge, and other officers as noted on the fifth day of November, A. D. 1907.

THE UNITED STATES OF AMERICA *vs.* 80 CHARLES H. FREEMAN, EDGAR M. BIGGS, and WELCH W. NOSSAMAN.	2027. Indictment for conspiracy to defraud United States.

At this day comes Ernest Knaebel, esquire, assistant to the Attorney-General, who prosecutes the pleas of the United States in this behalf, and the defendants by Clyde C. Dawson, esquire, and C. J. Hughes, junior, esquire, their attorneys, also come.

And the several motions of the defendants Charles H. Freeman and Edgar M. Biggs to quash the indictment herein, and of the defendant Welch W. Nossaman to quash the indictment herein; and

the joint and several demurrers of the defendants Charles H. Freeman and Edgar M. Biggs to the indictment herein, and the demurrer of the defendant Welch W. Nossaman to the indictment herein, and the plea of the defendant Welch W. Nossaman to the indictment herein coming on now to be heard, are argued by counsel to the hour of adjournment.

Thirty-first day, November term, Wednesday, December 11, A. D. 1907.

Present: The honorable Robert E. Lewis, district judge, and other officers as noted on the fifth day of November, A. D. 1907.

THE UNITED STATES OF AMERICA *vs.* CHARLES H. FREEMAN, EDGAR M. BIGGS, and Welch W. Nossaman.	2027. Indictment for conspiracy to defraud the United States.

81 At this day comes Ernest Knaebel, esquire, assistant to the Attorney-General, who prosecutes the pleas of the United States in that behalf, and the defendants by Clyde C. Dawson, esquire, and C. J. Huges, junior, esquire, their attorneys also come. And the several motions of the defendants Charles H. Freeman and Edgar M. Biggs to quash the indictment herein, and of the defendant Welch W. Nossaman to quash the indictment herein, and the joint and several demurrers of the defendants Charles H. Freeman and Edgar M. Biggs to the indictment herein, and the demurrer of the defendant Welch W. Nossaman to the indictment herein, and the plea of the defendant Welch W. Nossaman to the indictment herein coming on now to be heard, are argued by counsel and by the court taken under advisement.

Thirty-eighth day, November term, Tuesday, December 24th, A. D. 1907.

Present: The honorable Robert E. Lewis, district judge, and other officers as noted on fifth day of November, A. D. 1907.

THE UNITED STATES OF AMERICA *vs.* CHARLES H. FREEMAN, EDGAR M. BIGGS, and Welch W. Nossaman.	2027. Indictment for conspiracy to defraud the United States.

82 At this day comes Ralph Hartzell, esquire, assistant district attorney, who prosecutes the pleas of the United States in this behalf, and the defendants by Charles J. Hughes, junior, esquire, their attorney also come. And the separate demurrers of the defendants Charles H. Freeman and Edgar M. Biggs and of the defendant Welch W. Nossaman, and the plea of the defendant Welch

W. Nossaman, and the separate motions of the defendants Charles H. Freeman and Edgar M. Biggs, and of the defendant Welch W. Nossaman, to quash the indictment herein, having heretofore come on to be heard, and having been argued by Ernest Knaebel, esquire, assistant to the Attorney-General, and by Charles J. Hughes, junior, esquire, and Clyde C. Dawson, esquire, attorneys for the defendants, and the court having considered the same and being now fully advised in the premises, it seemeth to the court now here that the indictment herein is not sufficient in law to be answered unto, and so the said demurrers, and the plea of the defendant Welch W. Nossaman, and each thereof, be, and the same are hereby, sustained; and that the said motions to quash, and each thereof, be, and the same are hereby, granted, and that the indictment herein, be, and the same is hereby, quashed.

To which order and ruling of the court the plaintiff excepts and an exception is hereby allowed to it.

83 Forty-sixth day, November term, Monday, January 6th, A. D. 1908.

Present: The honorable Robert E. Lewis, district judge, and other officers as noted on fifth day of November, A. D. 1907.

THE UNITED STATES OF AMERICA, *v.* CHARLES H. FREEMAN, EDGAR M. BIGGS, and Welch W. Nossaman.	2027. Indictment for conspiracy to defraud the United States.

At this day comes Ernest Knaebel, esquire, special assistant to the Attorney-General, who prosecutes the pleas of the United States in this behalf, and the defendants by Charles J. Hughes, junior, esquire, and Clyde C. Dawson, esquire, their attorneys, also come. And it now appearing to the court that the order heretofore, and on the twenty-fourth day of December, A. D. 1907, at this same term entered herein is erroneous, it is ordered by the court that said order be, and the same is hereby vacated, set aside, and for naught held, and that the following stand in the place and stead thereof, to wit:

It is now ordered that the motions to quash the indictment herein be, and they hereby are, overruled, and that, for the reasons and upon the grounds stated in the opinions filed in this cause and cause

84 number 2028 in this court, on the twenty-fourth day of December last, the demurrer of the defendant Welch W. Nossaman, and his plea of the statute of limitations (the legal sufficiency, but not the allegations of facts of which plea was questioned by the plaintiff upon the argument) be, and they are hereby, sustained; and that, for the same reasons and grounds, in said opinions set forth, the demurrer of the defendants Edgar M. Biggs and Charles H. Freeman, including the defense therein set up based upon the statute of limitations (the legal sufficiency of which defense in substance

admitting the matters of fact therein alleged was drawn in question by the plaintiff at the argument) be, and they hereby are, sustained.

It is further ordered that, for the reasons and grounds aforesaid, set forth in the said opinions, the indictment in this cause be, and the same hereby is, quashed.

Wherefore, it is considered, ordered, and adjudged by the court, that the defendants of and from the premises in this said indictment specified be discharged and go hence hereof without day.

It is further ordered by the court that if the United States shall sue out a writ of error to the Supreme Court of the United States from this order and judgment, the defendants shall each enter into a personal recognizance before an United States commissioner
85 in the sum of one thousand dollars, ($1,000) conditioned that he shall personally appear in this court on the first day of the next term thereof at Denver, and from day to day and from term to term thereafter, and answer the indictment herein if the judgment herein shall be reversed by the said Supreme Court, and until such recognizances shall have been duly executed and filed with the clerk of this court the existing recognizances now on file in this case shall be and remain binding upon the defendants and their respective sureties.

To which order and judgment sustaining the said plea and the said demurrers and quashing the said indictment, the plaintiff then and there, at the time thereof, excepted, and an exception was allowed to it.

86 UNITED STATES OF AMERICA,
District of Colorado, ss:

In the District Court of the United States within and for the District of Colorado.

THE UNITED STATES OF AMERICA, PLAINTIFF,
v.
CHARLES H. FREEMAN, EDGAR M. BIGGS, AND Welch W. Nossaman, defendants. } No. 2027.

Bill of exceptions.

Be it remembered that on the 2nd day of December, 1907, in this cause, the defendant Welch W. Nossaman filed his demurrer to the indictment, and the defendants Charles H. Freeman and Edgar M. Biggs their demurrer to the indictment, in which demurrer last mentioned was included and alleged among other defenses the special affirmative defense of the respective defendants so filing the same, setting up the statute of limitations (Rev. Stat., sec. 1044) as a bar to the prosecution in connection with verified affirmative allegations, in substance and effect averring that such defendants were

not, and had not been, persons fleeing from justice within the meaning of the exception to that statute provided by section 1045 of the Revised Statutes.

And afterwards, and on the 10th day of December, 1907, in this cause, the said defendant Nossaman filed his separate plea in bar, likewise setting up the said statute of limitations as a defense in connection with, and supported by, affirmative allegations, in substance and effect averring that such defendant was not, and had not been, a person fleeing from justice, within the meaning of the said exception to the said statute of limitations; which said demur-

86½ rers, together with the aforesaid special defense, so alleged with one thereof as aforesaid, and likewise the said special plea so filed by the said defendant Nossaman, are respectively set forth in words and figures in the transcript of the record proper of this cause, at pages 27 to 70 and 75 to 80 of such transcript, as the said transcript is prepared and will be duly certified to the Supreme Court pursuant to the writ of error to be sued out by the United States for the review of the judgment and decision herein in that court; and in lieu of setting forth the said demurrers (including the said special defense so pleaded with the demurrer of the said Biggs and Freeman), and the said special plea of the defendant Nossaman, at large here in this bill of exceptions reference is hereby made to that part of the said transcript where they so appear, and the same are by this reference taken and considered as a part of this bill of exceptions as though here fully extended.

And on the 10th day of December, 1907, before the court, Honorable Robert E. Lewis, district judge, presiding, and Charles J. Hughes, jr., esquire, and Clyde C. Dawson, esquire, appearing as counsel for the defendants, and Ernest Knaebel, special assistant to the Attorney-General, appearing for the United States, this cause came on to be heard upon the indictment herein, the said demurrers thereto, the said special defense so pleaded with said demurrer of the defendants Biggs and Freeman, and the said special plea so filed by the said defendant Nossaman, and was argued by counsel, the truth of the said affirmative allegations of fact alleged, as aforesaid, in support of the said special defense and plea of the statute of limitations to show that the respective defendants had not been fugitives from justice, being admitted, but the legal sufficiency in substance of such defense and plea, and each thereof, being drawn in question by the counsel for the United States at the argument.

87 And thereafter, and on the 24th day of December, 1907, the said court made its decision and order upon the matters so heard and argued, sustaining the said demurrers, and the said special defense and plea based upon the statute of limitations, all for the reasons and upon the grounds, and those only, set forth in two written opinions then filed by the court, one in this cause and the other in causes number 2028 in said court, entitled The United States v.

Edgar M. Biggs et al., which opinions are respectively in words and figures as follows, that is to say:

88 In the District Court of the United States for the District of Colorado.

UNITED STATES OF AMERICA, plaintiff, v. CHARLES H. FREEMAN ET AL., defendants.	No. 2027. R. S. U. S., sec. 5440.

The charging part of this indictment is identical with the one in case No. 2028, except in that it here charges the conspiracy to have been entered into on March 30th, 1901, and that seventeen hundred and sixty acres of land were to be acquired from the United States, and in that it omits the charge, as found in that case, to the effect that titles to said lands were to be passed to one Barth in trust for the corporation.

The first eleven overt acts are, in substance, identical with the first seven overt acts charged in indictment in case No. 2028, except that here the first overt act is charged to have been done on March 30th, 1901, the second overt act on April 9th, 1901, the third overt act on April 9th, 1901, the fourth overt act on June 18th, 1901, the fifth overt act on June 18th, 1901, the sixth overt act on August 7th, 1901, the seventh overt act on August 7th, 1901, the eighth overt act on August 8th, 1901, the ninth overt act on August 10th, 1901, the tenth overt act on August 12th, 1901, the eleventh overt act on August 12th, 1901.

89 In the twelfth overt act it is charged that the three defendants, on May 5th, 1905, at the city of Washington, D. C., "unlawfully did cause and procure the issuance by the said United States of a patent for the lands described in overt act number 1 running to the said Leslie W. Smith."

The thirteenth overt act is of like character and of the same date as last mentioned, in procuring patent to issue to one Bird.

The fourteenth overt act is of like character and of the same date, in procuring patent to issue to one Rossell.

The fifteenth overt act is of like character and of the same date, in procuring patent to issue to one Todd.

The sixteenth overt act is of like character and of the same date, in procuring patent to issue to one Norton.

The seventeenth overt act is of like character and of the same date, in procuring patent to issue to one Waber.

The eighteenth overt act is of like character and of the same date, in procuring patent to issue to one Hyler.

The nineteenth overt act is of like character and of the same date, in procuring patent to issue to one Bostwick.

The twentieth overt act is of like character and of the same date, in procuring patent to issue to one Furrow.

The twenty-first overt act is of like character and
90 of the same date, in procuring patent to issue to one Blake.

The twenty-second overt act is of like character and of the same date, in procuring patent to issue to one Eddy—these patentees all being entrymen named in prior overt acts.

The twenty-third overt act charges that the defendant Nossaman, on February 19th, 1907, " unlawfully did require and procure the said Mark Todd (one of the entrymen) to sign and execute a certain deed of conveyance " conveying the title to the said lands described in overt act number 4 to the said New Mexico Lumber Company. Said deed is then set forth in hec verba.

The twenty-fourth overt act is to like effect as the twenty-third overt act, in requiring and procuring one Norton to execute deed of conveyance to said corporation.

Section 5440 R. S. U. S., and the act of June 3rd, 1878, amended August 4th, 1892, known as the timber and stone land act, will hereafter be noticed.

To this indictment demurrers and motions to quash have been interposed and argued.

I.

Aside from what was said about the Barth deed in case No. 2028, United States v. Biggs et al., the same principles applied in that case are applicable here, and for the reasons there given this indictment is bad.

91 The demurrers and motions to quash are sustained.

December 24th, 1907.

ROBERT E. LEWIS, *District Judge.*

116 To which action, decision and order of the court sustaining the said demurrers, plea and special defense, for the reasons and upon the grounds aforesaid, the United States, by its counsel, then and there duly excepted.

And thereafter, on the 6th day of January, 1908, the said court made and entered its final order and judgment in this cause, pursuant to the said decision, and based upon the reasons and grounds in the said opinions set forth, and upon said reasons and grounds sustaining the said demurrers, and the said plea, and the said special defense of the statute of limitations (so alleged with the demurrer of the said Biggs and Freeman), and quashing the indictment and adjudging that the defendants of and from the premises in the indictment specified, be discharged and go hence without day.

To which order and judgment of the court, and to each and every part thereof and particularly to those parts thereof, upon the reasons and grounds aforesaid, sustaining the said demurrers and the said plea and special defense, and quashing the said indictment, and adjudging that the defendants, of and from the premises in the indictment specified, be discharged and go hence without day, the United States, by its counsel, then and there duly excepted.

And foreasmuch as the foregoing matters do not appear of record, the plaintiff tenders this its bill of exceptions, and prays that the same may be signed and duly authenticated and made part of the record herein, which is accordingly done this 21" day of January, 1908.

ROBT. E. LEWIS, *District Judge.*

Service of the foregoing bill of exceptions was made upon us this 18th day of January, 1908.

CLYDE C. DAWSON,
CHARLES J. HUGHES, JR.,
Attorneys for the defendants in the above-entitled cause.

117 (Endorsed:) No. 2027. R. S. U. S. Sec. 5440. In the U. S. District Court. United States of America, plaintiff, v. Charles H. Freeman et al., defendants. Bill of exceptions. Filed Jan. 21, 1908, Charles W. Bishop, clerk.

118 UNITED STATES OF AMERICA,
District of Colorado, ss:

In the District Court of the United States within and for the District of Colorado.

THE UNITED STATES OF AMERICA, PLAINTIFF,
v.
CHARLES H. FREEMAN, EDGAR M. BIGGS AND WELCH W. NOSSAMAN, DEFENDANTS. } No. 2027.

Petition for writ of error.

And comes now the United States, plaintiff herein, and says that on the 24th day of December, 1907, this court made its decision sustaining the demurrers and special pleas of the defendants and setting aside the indictment in this cause, and that thereafter, and on the 6th day of January, 1908, this court, pursuant to that decision, entered judgment herein in favor of the defendants and against this plaintiff, in which judgment and decision certain errors were committed to the prejudice of this plaintiff, and of such a character as to entitle this plaintiff, under the law, to review the said judgment and decision in the Supreme Court of the United States by writ of error, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, this plaintiff prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of the errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the said Supreme Court.

119 RALPH HARTZELL,
Ass't & Acting United States Attorney for the District of Colorado,
ERNEST KNAEBEL,
Special Assistant to the Attorney-General,
Attorneys for Plaintiff.

UNITED STATES OF AMERICA,
District of Colorado, ss:

Upon reading and filing the foregoing petition and the assignment or errors therein referred to, it is ordered that the petition be, and the same hereby is, allowed and that a writ of error as therein prayed be issued by the clerk of the Circuit Court for this district, under the seal of such Circuit Court, pursuant to section 1004 of the Revised Statutes.

Dated, Denver, Colorado, January 22nd, 1908.

ROBT. E. LEWIS, *District Judge.*

(Endorsed:) No. 2027. United States District Court, District of Colorado. The United States of America, plaintiff, v. Charles H. Freeman et al., defendants. Petition for writ of error and order allowing writ. Filed Jan. 22, 1908. Charles W. Bishop, clerk.

120 UNITED STATES OF AMERICA,
District of Colorado, ss:

In the District Court of the United States within and for the District of Colorado.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
CHARLES H. FREEMAN, EDGAR M. BIGGS, AND WELCH W. NOSSAMAN, DEFENDANTS. } No. 2027.

Assignment of errors.

Comes now the United States of America, plaintiff in the above-entitled cause, and files this assignment of errors upon which it will rely in the prosecution of the writ of error to be sued out by it for review by the Supreme Court of the judgment heretofore entered by the District Court for the District of Colorado in the above-entitled cause, to wit:

First. The District Court for the District of Colorado erred in quashing the indictment in the above-entitled cause.

Second. The said District Court erred in sustaining the demurrer of the defendant, Welch W. Nossaman, to the indictment in said cause.

Third. The said District Court erred in sustaining the demurrer of defendants, Edgar M. Biggs and Charles H. Freeman, to the indictment in said cause.

Fourth. The said District Court erred in overruling the demurrer of the United States interposed ore tenus at the time of the argument and questioning the legal sufficiency as a defense of
121 the special plea of the defendant Nossaman, setting up the statute of limitations in bar of the prosecution, and in sustain-

ing the said special plea in bar, the said defendant Nossaman having never been put in jeopardy in the cause.

Fifth. The said District Court erred in overruling the demurrer of the United States, interposed ore tenus at the time of argument, and questioning the legal sufficiency as to substance of the special plea of the defendants, Biggs and Freeman, interposed by them in and with their demurrer to the indictment, and setting up the statute of limitations as a bar to the prosecution, and in sustaining the said special plea in bar, neither the said defendant Freeman nor the said defendant Biggs having ever been put in jeopardy in the cause.

Sixth. The said District Court erred in construing section 5440 of the Revised Statutes, as amended by the act of May 17, 1879 (21 Stat. L., page 4), in effect so as to limit and restrain the operation of that section (so amended) to conspiracies to commit substantive criminal offenses against the United States and conspiracies to defraud the United States by means necessarily involving the commission of substantive criminal offenses against the United States and in sustaining the demurrers of the defendants and quashing the indictment upon the basis of such erroneous construction of said statute.

Seventh. The said District Court erred in construing section 5440 of the Revised Statutes (as so amended) as inapplicable to conspiracies, such as the conspiracy described in the said indictment, wherein and whereby the conspirators intend and agree to procure indirectly from the United States for a corporation numerous tracts of the
122 public timber lands of the United States, susceptible of entry under the act of June 4, 1878 (20 Stat. L., 91), commonly called the timber and stone act, by inducing and procuring numerous other persons to make entry and purchase of said tracts, severally and respectively, each in his own name and ostensibly for his own use and benefit, but each in fact pursuant to an intention on his part and an antecedent agreement with the conspirators to enter and purchase the land from the United States for the use of such corporation with moneys to be furnished by it and to deed the land to the corporation after entry, all in consideration of some small sum of money to be paid to him by the conspirators under such agreement between him and them; and in sustaining the demurrers of the defendants and quashing the indictment upon the basis of such false and erroneous construction of the said statute.

Eighth. The said District Court erred in its construction of Revised Statutes, sec. 5440 (as so amended), in holding that each act done by a party to any conspiracy denounced thereby, and done to effect the object of such conspiracy, completes a separate and distinct offense under the said section in such a sense that an indictment, such as the indictment in this cause, charging such conspiracy, and, in the same count, more than one act so done to effect the object thereof, is vicious for duplicity, and in sustaining the said demurrers and quashing the said indictment partly upon and because of such erroneous construction.

Ninth. The said District Court erred in its view and construction of sec. 5440 of the Revised Statutes (as so amended) in this, to wit: In holding, in substance and effect that the word "conspire" in said section respects only the act of reaching the original unlawful
123 consensus and agreement among and between the conspirators, and not also the subsequent continued adherence to, and participation in such consensus and agreement by the conspirators; and in further holding, upon the basis of that erroneous interpretation of the word "conspire," that the offense in the said indictment charged was barred by the statute of limitations (Rev. Stat., sec. 1044), because it appeared upon the face of the said indictment that acts to effect the object of the conspiracy therein described were done by parties to the conspiracy after its original formation, and more than three years prior to the return of the indictment, and because it was further shown by the allegations of fact, contained in the special pleas below mentioned, and admitted to be true by the United States at argument, that the defendants were not fugitives from justice, although the indictment expressly charges and shows that the accused and others were in continuous, unlawful agreement and conspiracy from a time certain preceding the performance of the first act charged as done to effect its object, to the time of the return of the indictment, and that other acts, done by parties to the conspiracy to effect the object thereof, were done at times within the three years next preceding the return of the indictment; and the said District Court, acting upon the said erroneous statutory interpretation and construction in this specification mentioned, further erred in overruling the objections, amounting, in legal effect, to demurrers ore tenus, made at argument by the United States to the special plea of the defendant, Nossaman, setting up the statute of limitations in bar of the prosecution and to the like special plea of the other defendants set up in connection with, and as though a part of their demurrer, and in thereupon sustaining the said special pleas, quashing the said indictment and ren-
124 dering judgment for the defendants; none of the said defendants having ever been put in jeopardy for the said offense charged.

Tenth. The said District Court erred in rendering judgment for the defendants based upon the erroneous constructions and interpretations of section 5440 of the Revised Statutes (as amended), which are described and indicated in the sixth, seventh, eighth, and ninth specifications of this assignment of errors.

Eleventh. The said District Court erred in holding that section 5440 of the Revised Statutes (as amended), taken in connection with the said timber and stone act, did not apply to the facts set forth in the indictment, so as to make the defendants liable as for a criminal offense; and in sustaining the said demurrers to the indictment upon that ground.

Twelfth. The said District Court erred in holding that the facts stated in the indictment did not make a case of conspiracy to defraud

the United States within the meaning of section 5440 of the Revised Statutes (as amended), regard being had to the provision of the said timber and stone act which limits the amount of land which an association of persons can purchase thereunder from the Government to 160 acres; and in thereupon sustaining the said demurrers to the indictment.

Thirteenth. The said District Court erred in not holding that the indictment fully and sufficiently charged the defendants with the offense of conspiring to defraud the United States within the meaning of section 5440 of the Revised Statutes of the United States, and in not overruling the said demurrers to the indictment accordingly.

Fourteenth. The said District Court erred in holding that section 5440 of the Revised Statutes (as amended), in connection with the provisions of the said timber and stone act, does not make criminal a conspiracy to obtain from the United States, for a corporation,
125 timber lands in excess of 160 acres by procuring a number of other persons to purchase from the United States separately, and with moneys furnished by the corporation, such quantities of timber lands as they might, respectively, lawfully purchase, and thereupon, in pursuance of an antecedent agreement to that end, convey such lands over to the corporation; and in thereupon sustaining the said demurrers to the indictment.

Fifteenth. The said District Court erred in holding that section 5440 of the Revised Statutes (as amended), in connection with the provisions of the said timber and stone act, did not make criminal a conspiracy to obtain from the United States, for a corporation, timber lands in excess of 160 acres by procuring a number of other persons to purchase from the United States separately, and with moneys furnished by the corporation, such quantities of timber lands as they might, respectively, lawfully purchase, and thereupon, in pursuance of an antecedent agreement to that end, convey such lands to the corporation, even though such persons had already filed their preliminary applications to enter such lands before they were so induced by the defendants to complete their entries; and in thereupon sustaining the said demurrers to the indictment.

Sixteenth. The said District Court erred in not holding that the indictment sufficiently charged a conspiracy upon the part of the defendants to defraud the United States by obtaining, for a corporation named, in an indirect and fraudulent manner, a quantity of timber lands in excess of the quantity which they could have lawfully obtained directly for such corporation; and in thereupon sustaining the said demurrers to the indictment.

Seventeenth. The said District Court erred in holding that, because the charges of overt acts were predicated upon steps taken subsequently to the making of the preliminary applications, the indictment
126 charged a conspiracy to obtain timber lands from the entrymen, after the entrymen had filed their preliminary applications, rather than from the United States, through such entrymen, by

procuring them to make and file such preliminary applications amongst other things; and in thereupon sustaining the said demurrers to the indictment.

Eighteenth. The said District Court erred in holding the indictment bad for duplicity in that it charged a conspiracy originating, and overt acts committed, more than three years before the presentation of the indictment, although it also charged that the conspiracy was engaged in continuously from the time when it began down to the time of the presentation of the indictment and that overt acts were committed within the three years next before the finding of the indictment; and in thereupon sustaining the said demurrers to the indictment upon the ground of duplicity.

Nineteenth. The said District Court erred in holding that the allegations of the indictment to the effect that the defendants were to procure other persons to make entries of timber lands which were open to entry under the said Timber and Stone Act, and secure patents therefor, did not cover the making by such persons of preliminary applications for such lands required by section 2 of the said act; and in thereupon sustaining the said demurrers to the indictment.

Twentieth. The said District Court erred in not holding that the indictment sufficiently charged a conspiracy to defraud the United States by obtaining, for a corporation named, in an indirect and fraudulent manner, a quantity of timber lands in excess of the quantity which they could have lawfully obtained directly for such corporation; and this by procuring other persons for hire to do everything necessary to the securing of the title to such lands from
127 the United States, including the executing and filing in the land office not only of the preliminary applications required of such entrymen, but also the taking of any and all steps necessary to the securing of such title in such entrymen as parts of the conspiracy, and in not overruling the said demurrers to the indictment.

Twenty-first. The said District Court erred in not holding that the indictment could consistently and properly charge the offense of conspiracy as having been begun more than three years before the finding of the indictment, when it also charged that the conspiracy still existed and overt acts were committed thereunder within the three years next preceding the finding of the indictment; and in not accordingly overruling the opposite contention of the defendants made in and in conection with the said special plea of the defendant Nossaman and the said demurrer of the defendants, Biggs and Freeman.

Twenty-second. The said District Court erred in not holding that the allegations of the indictment which charged that the conspiracy originated more than three years before the presentation of the indictment were mere matters of inducement to the real charge of conspiracy within three years, and that these and the overt acts charged to have been committed more than three years before the presentation of the indictment were not matters tending to vitiate the indictment;

and in sustaining the said special defenses of the defendants based upon the statute of limitations, and in setting the indictment aside, upon and because of that erroneous holding.

Twenty-third. The said District Court erred in holding that the overt acts charged in the indictment could be looked to as furnishing in part a description of the conspiracy itself; and in holding the indictment insufficient and setting the same aside, upon an erroneous construction of the charging part thereof, based upon such reference to the charges of overt acts.

128 Twenty-fourth. The said District Court erred in sustaining the demurrer of the defendants Biggs and Freeman to the indictment raising the point that the offense charged in the indictment was barred by the statute of limitations in connection with averments that the defendants had not been fugitives from justice.

Wherefore the United States of America prays that the judgment of the District Court of the United States for the district of Colorado be reversed, and that the said District Court be directed to reinstate the said indictment and proceed with the trial of the cause.

RALPH HARTZELL,
Assistant and Acting United States Attorney for the District of Colorado.

ERNEST KNAEBEL,
Special Assistant to the Attorney-General.

(Endorsed:) No. 2027. In the U. S. District Court. The United States of America, plaintiff, vs. Charles H. Freeman, Edgar M. Biggs, and Welch W. Nossaman, defendants. Assignment of errors. Filed Jan. 22, 1908. Charles W. Bishop, clerk. Earl M. Cranston, U. S. district attorney, district of Colorado.

129 Fifty-fifth day, November Term, Wednesday, January 22nd, A. D. 1908.

Present: The Honorable Robert E. Lewis, district judge, and other officers as noted on the fifth day of November, A. D. 1907.

THE UNITED STATES OF AMERICA
vs.
CHARLES H. FREEMAN ET AL.
} 2027. Indictment for conspiracy to defraud the United States.

Upon reading and filing the foregoing petition and the assignment of errors therein referred to; it is ordered that the petition be, and the same hereby is, allowed and that a writ of error as therein prayed be issued by the clerk of the circuit court for this district, under the seal of such circuit court, pursuant to section 1004 of the revised statutes.

130 UNITED STATES OF AMERICA,
District of Colorado, ss:

In the District Court of the United States for the District of Colorado.

UNITED STATES
versus
CHARLES H. FREEMAN ET AL. } No. 2027.

The clerk will issue a complete transcript of the record in the above-entitled cause, said transcript to contain indictment, all demurrers, motions, and pleas, and all orders of court, together with the opinion of the court.

EARL M. CRANSTON,
Attorney for U. S.

To CHARLES W. BISHOP, *Clerk.*
DENVER, COLORADO, *Jan. 4, 1908.*

(Endorsed:) No. 2027. United States District Court for the District of Colorado. U. S. versus Charles H. Freeman et al. Præcipe for transcript of record. Filed Jan. 4, 1908. Charles W. Bishop, clerk. Earl M. Cranston, attorney for U. S.

131 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judge of the District Court of the United States for the District of Colorado, greeting:

Because in the record, decision, and proceedings, as also in the rendition of the judgment of a plea which is in the said district court before you, between The United States of America, plaintiff, and Charles H. Freeman, Edgar M. Biggs, and Welch W. Nossaman, defendants, a manifest error hath happened, to the great damage of the said United States of America as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 22nd day of January, in the year of our Lord one thousand nine hundred and eight.

[SEAL.] CHARLES W. BISHOP,
Clerk of the Circuit Court of the United States for the District of Colorado.

Allowed by—
ROB'T. E. LEWIS,
Judge of the District Court of the United States for the District of Colorado.

131½ *Return.*

THE UNITED STATES OF AMERICA,
District of Colorado, ss:

In obedience to the command of the within writ, I herewith transmit to the honorable the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof I hereunto subscribe my name and affix the seal of said United States District Court for the District of Colorado, at Denver, in said district, this third day of February, A. D. 1908.

[SEAL] CHARLES W. BISHOP, *Clerk.*

(Indorsed:) No. 2027. U. S. District Court, District of Colorado. The United States of America vs. Charles H. Freeman, Edgar M. Biggs, and Welch W. Nossaman. Writ of error to U. S. District Court, District of Colorado. Filed in the District Court of the United States for the District of Colorado Jan. 22, 1908. Charles W. Bishop, clerk.

132 UNITED STATES OF AMERICA, *ss:*

To Charles H. Freeman, Edgar M. Biggs, and Welch W. Nossaman, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the District Court of the United States for the district of Colorado, sitting at Denver, wherein the United States of America is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment and decision rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Robert E. Lewis, judge of the District Court of the United States for the District of Colorado, this 22d day

of January, in the year of our Lord one thousand nine hundred and eight.

ROBT. E. LEWIS,
Judge of the District Court of the United States for the District of Colorado.

132½ On this day of , in the year of our Lord one thousand nine hundred and , personally appeared before me, the subscriber, and makes oath that he delivered a true copy of the within citation to .

Sworn to and subscribed the day of , A. D. 190 .

UNITED STATES OF AMERICA,
District of Colorado:

I hereby certify that I received the within citation on January 27th, 1908, and served the same as to the defendants herein named: Charles H. Freeman, Edgar M. Biggs, and Welch W. Nossaman, by delivering to and leaving with Charles J. Hughes, jr., their attorney of record, a true copy of the within writ on January 27th, 1908, at Denver, Colorado.

D. C. BAILEY,
U. S. Marshal.
E. G. JEFFERDS,
Deputy.

Marshal's fees and expenses:

3 services	$6.00
Car fare	.10
	$6.10

(Indorsed:) 2482. Serve on Chas. J. Hughes, jr., atty. for defts. 2027. U. S. District Court, District of Colorado. The United States of America vs. Charles H. Freeman et al. Citation. Filed Jan. 29, 1908. Charles W. Bishop, clerk.

133 UNITED STATES OF AMERICA,
District of Colorado, ss:

I, Charles W. Bishop, clerk of the district court of the United States for the district of Colorado, do hereby certify the above and foregoing pages numbered from one (1) to one hundred and thirty (130), both inclusive, to be a true, perfect, and complete transcript and copy of the pleadings and other matters set forth in the praecipe filed herein, together with a true copy of such praecipe, and bill of exceptions, petition for writ of eror, and assignments of error, and judgments and all other matters (exclusive of bench warrants, recognizances, and briefs), heretofore filed or entered of record in said

court, and in a certain case lately in said court pending wherein The United States of America was plaintiff and Charles H. Freeman, Edgar M. Biggs, and Welch W. Nossaman were defendants, as fully and completely as the same still remain on file and of record in my office at Denver.

And I further certify that I have annexed to and transmit herewith a copy of all opinions heretofore handed down and filed in said case.

In testimony to the above, I do hereunto sign my name and affix the seal of said court at the city and county of Denver, in said district, this third day of February, A. D. 1908.

[SEAL.] CHARLES W. BISHOP, *Clerk.*

* * * * * * *

137 UNITED STATES OF AMERICA,
District of Colorado, ss:

I, Charles W. Bishop, clerk of the District Court of the United States for the District of Colorado, do hereby certify the above and foregoing pages numbered from one hundred thirty-four (134) to one hundred thirty-seven (137) to be a true, perfect, and complete transcript and copy of all opinions heretofore handed down and filed in said court and in a certain case lately in said court pending wherein The United States of America was plaintiff and Charles H. Freeman, Edgar M. Biggs, and Welch W. Nossaman were defendants, as fully and completely as the same still remains on file in my office at Denver.

In testimony to the above, I do hereunto sign my name and affix the seal of said court at the city and county of Denver in said district, this third day of February, A. D. 1908.

[SEAL.] CHARLES W. BISHOP, *Clerk.*

138 In the Supreme Court of the United States. October Term, 1907.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
CHARLES H. FREEMAN ET AL. } No. 627.

Stipulation.

It is hereby stipulated by counsel for the parties to the above-entitled cause that in the printing of the transcript of the record herein the clerk of the Supreme Court shall omit pages 92 to 115, inclusive, being the opinion of the court in the case of The United States v. Edgar M. Biggs et al., that opinion being printed in the transcript of the record in that case; also pages 134 to 137, inclusive, being a

repetition of the opinion of the court herein, that opinion appearing elsewhere, to wit, at pages 88 to 91, inclusive, of the transcript of the record.

H. M. HOYT,
Solicitor-General.
CLYDE C. DAWSON,
Counsel for Defendant in Error.

FEBRUARY, 1908.

139 (Indorsed:) File No. 21030. Supreme Court U. S. October term, 1907. Term No. 627. The United States, P. E., vs. Charles H. Freeman et al. Stipulation to omit part of record in printing. Filed Feb. 29, 1908.

(Indorsement on cover:) File No. 21030. Colorado D. C. U. S. Term No. 627. The United States, plaintiff in error, vs. Charles H. Freeman, Edgar M. Biggs, and Welch W. Nossaman. Filed February 19th, 1908. Filed No. 21030.

()

...S.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

October Term, 19[illegible]

No. [illegible]239.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

EDGAR M. BIGGS, CHARLES H. FREEMAN, CHARLES A. MEPHAM, AND JOHN J. McGRATH.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED [illegible], 19[illegible].

(24,081)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 628.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

EDGAR M. BIGGS, CHARLES H. FREEMAN, CHARLES D. McPHEE, AND JOHN J. McGINNITY.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

INDEX.

	Original.	Print.
Caption	1	1
Order for bench warrant, etc	1	1
Indictment	2	1
Order to plead	16	8
Motion to quash by McPhee & McGinnity	17	8
Motion to quash by Biggs & Freeman	19	9
Demurrer of McPhee & McGinnity	22	11
Demurrer of Biggs & Freeman	40	19
Affidavit of John J. McGinnity	57	27
Order beginning hearing	59	28
Order concluding hearing	60	28
Order sustaining demurrers, etc	61	29
Judgment	62	29
Bill of exceptions	65	30
Opinion	67	32
Judge's certificate to bill of exceptions	92	43
Acceptance of service of bill of exceptions	92	44
Petition for writ of error	94	44
Order allowing writ of error	95	45
Assignment of errors	96	45
Order allowing writ of error	105	51
Præcipe for transcript	106	51
Writ of error	107	51
Return on writ of error	107½	52
Citation and service	108	52
Clerk's certificate	109	53
Opinion. (Omitted in printing.)		
Clerk's certificate	134	54
Stipulation to omit part of record in printing	136	54

1 Pleas in the District Court of the United States for the district of Colorado, sitting at Denver.

Be it remembered that heretofore and on, to wit, the twenty-second day of June, A. D. 1907, the same being one of the regular juridical days of the May term, A. D. 1907, of said court, present, the honorable Robert E. Lewis, district judge, the following proceeding was had and entered of record in said court, to wit:

In the matter of the grand jury.

At this day come the members of the grand jury, heretofore duly empanelled and sworn as grand jurors, and return into court now here the following true bills of indictment, to wit:

* * * * * * *

THE UNITED STATES OF AMERICA *vs.* EDGAR M. BIGGS, CHARLES H. Freeman, Charles D. McPhee, and John J. McGinnity.	2028. Indictment for conspiracy.

(Endorsed:) A true bill. (Signed) E. D. Welker, foreman.

And thereupon it is ordered by the court that a bench warrant issue without delay against the defendants and returnable forthwith,
2 and that the defendants be let to bail before an United States commissioner for their appearance in this court from day to day and from term to term, to answer unto the indictment herein, as follows, to wit, Edgar M. Biggs in the sum of five thousand dollars ($5,000), Charles H. Freeman in the sum of three thousand dollars ($3,000), Charles D. McPhee in the sum of five thousand dollars ($5,000), and John J. McGinnity in the sum of five thousand dollars ($5,000).

* * * * * * *

And the said indictment is in words and figures as follows, to wit:

In the District Court of the United States of America for the district of Colorado, of the May term, in the year nineteen hundred and seven.

DISTRICT OF COLORADO, *ss.*

The grand jurors for the United States of America, impaneled and sworn in the District Court of the said United States for the district of Colorado, and inquiring for that district, upon their oath present, that Edgar M. Biggs, Charles H. Freeman, Charles D. McPhee, and John J. McGinnity, late of the city of Durango, in the said district, on the twenty-fifth day of August, in the year eighteen hundred and ninety-nine, and at the several times of the committing of the
3 several overt acts hereafter in this indictment mentioned, and continuously at all times between the said twenty-fifth day of

August, in the year last aforesaid, and the day of the presenting of this indictment, at Durango aforesaid, in the said district, unlawfully, corruptly, wickedly, and maliciously did conspire, combine, confederate, and agree together, and with divers other persons to the said grand jurors unknown, indirectly to obtain from the said United States, for a certain corporation, to wit, The New Mexico Lumber Company, theretofore organized under the laws of the State of Colorado and then and there existing and doing business under that name, a large quantity, to wit, eleven hundred and seventeen acres, of timber lands in excess of the quantity of such lands which the said corporation could lawfully obtain directly from the said United States, regard being had to the laws thereof pertaining to the entry and sale of such lands; which said timber lands so to be obtained then were lands lying within the Durango land district of the said United States, in the said district of Colorado, which were surveyed vacant public lands of the said United States not included within any military, Indian, or other reservation, lands which had not been offered at public sale according to law, and which were unfit for cultivation, chiefly valuable for timber, and open to entry at the land office of the said United States at Durango aforesaid under the laws of the said United States pertaining to the entry and sale of timber lands
4 and under the regulations theretofore made and prescribed pursuant to law by the Commissioner of the General Land Office, with the approval of the Secretary of the Interior, descriptions of which said lands by legal subdivisions are set forth in that part of this indictment where the said Charles H. Freeman is charged with the committing of overt acts in procuring the execution and verification of certain documents, each entitled "Testimony of claimant," by certain persons, respectively, in those documents named, for presentation by them to the register of the said land office at Durango aforesaid, and through him to the said Commissioner and the said Secretary, in connection with the entry of the same lands by those persons in quantities allowed to them, respectively, by law, being overt acts numbered 1 to 7, both inclusive.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that the said timber lands were so to be obtained as aforesaid, from the said United States, for the said corporation, by the said defendants soliciting and procuring the persons aforesaid, for hire and under agreements with them separately to that end, to pay to the receiver of the said land office, with moneys to be furnished to them by the said corporation, the price fixed by law therefor, make entries as individual entrymen, at the land office aforesaid, with the said register, of tracts of such lands in quantities respectively not
5 exceeding the quantities allowed by the said laws and regulations, secure patents from the said United States for the said lands to themselves as such entrymen, and make conveyances of the title to the said lands to one William Barth, an agent of and trustee for the said corporation, and by the said defendants requiring the said William Barth to convey such title to the said corporation.

OVERT ACTS.

1. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said Charles H. Freeman afterwards, to wit, on the twenty-fifth day of August, in the same year eighteen hundred and ninety-nine, at Durango aforesaid, in the said District of Colorado, unlawfully did, by solicitation and promise of reward to her in some small sum of money the amount whereof is to the said grand jurors unknown, induce and procure one Jennie Culbertson to execute and verify by her oath before the said register a certain document, in the form prescribed by law and entitled "Testimony of claimant," for presentation by the said Jennie Culbertson to the said register, and through the said register to the said Commissioner and the said Secretary, in connection with the entry by the said Jennie Culbertson of the following-described timber lands, to wit: The southeast quarter of the northeast quarter, and the
6 northeast quarter of the southeast quarter of section twenty-three, the southwest quarter of the northwest quarter, and the northwest quarter of the southwest quarter of section twenty-four, in township thirty-four north, and range four west, references being had to the New Mexico principal meridian and base line, containing one hundred and sixty acres.

2. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same the said Charles H. Freeman afterwards, to wit, on the twenty-sixth day of August, in the same year eighteen hundred and ninety-nine, at Durango aforesaid, in the said District of Colorado, unlawfully did, by solicitation and promise of reward to him in some small sum of money the amount whereof is to the said grand jurors unknown, induce and procure one Frank Dodson to execute and verify by his oath before the said register a certain document, in the form prescribed by law and entitled "Testimony of claimant," for presentation by the said Frank Dodson to the said register, and through the said register to the said Commissioner and the said Secretary, in connection with the entry by the said Frank Dodson of the following-described timber lands, to wit: The south half of the northeast quarter, and lots
7 one and two, of section one, in township thirty-four north and range three west, reference being had to the New Mexico principal meridian and base line, containing one hundred and sixty acres.

3. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said Charles H. Freeman afterwards, to wit, on the twenty-sixth day of August,

in the same year eighteen hundred and ninety-nine, at Durango aforesaid, in the said District of Colorado, unlawfully did, by solicitation and promise of reward to him in some small sum of money the amount whereof is to the said grand jurors unknown, induce and procure one Robert H. Bostwick to execute and verify by his oath before the said register, a certain document, in the form prescribed by law and entitled "Testimony of claimant," for presentation by the said Robert H. Bostwick to the said register, and through the said register to the said Commissioner and the said Secretary, in connection with the entry by the said Robert H. Bostwick, at the said land office at Durango, of the following-described timber lands, to wit: The east half of the southwest quarter, the southeast quarter of the northwest quarter, and lot three, of section one, in township thirty-four north and range three west, reference being
8 had to the New Mexico principal meridian and base line, containing one hundred and sixty acres.

4. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said Charles H. Freeman afterwards, to wit, on the eleventh day of October, in the same year eighteen hundred and ninety-nine, at Durango aforesaid, in the said district of Colorado, unlawfully did, by solicitation and promise of reward to her, in some small sum of money the amount whereof is to the said grand jurors unknown, induce and procure one Carrie Laithe to execute and verify by her oath before the said receiver, a certain document, in the form prescribed by law and entitled "Testimony of claimant," for presentation by the said Carrie Laithe to the said register and through the said register to the said Commissioner and the said Secretary, in connection with the entry by the said Carrie Laithe of the following described timber lands, to wit: The east half of the north-east quarter of section sixteen, the northwest quarter of the northwest quarter of section fifteen, and the southeast quarter of the southeast quarter of section nine, in township thirty-four north and range five west, reference being
9 had to the New Mexico principal meridian and base line, containing one hundred and sixty acres.

5. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said Charles H. Freeman afterwards, to wit, on the said eleventh day of October, in the same year eighteen hundred and ninety-nine, at Durango aforesaid, in the said district of Colorado, unlawfully did, by solicitation and promise of reward to her in some small sum of money the amount whereof is to the said grand jurors unknown, induce and procure one Elizabeth Dunnavant to execute and verify by her oath before the said register, a certain document, in the form prescribed by law and entitled "Testimony of claimant," for presentation by the

said Elizabeth Dunnavant to the said register and through the said register to the said Commissioner and the said Secretary, in connection with the entry by the said Elizabeth Dunnavant of the following described timber lands, to wit: The west half of the northeast quarter of section nine, lots three and four of section three, and lots one and two of section four, in township thirty-four north and range five west, reference being had to the New Mexico principal meridian and base line, containing one hundred and fifty-seven acres.

6. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said Charles H. Freeman afterwards, to wit, on the said eleventh day of October in the same year eighteen hundred and ninety-nine, at Durango, aforesaid, in the said district of Colorado, unlawfully did, by solicitation and promise of reward to him in the sum of seventy-five dollars, induce and procure one Ethereal T. Walker to execute and verify by his oath before the said register a certain document, in the form prescribed by law and entitled "Testimony of claimant," for presentation by the said Etherial T. Walker to the said register, and through the said register to the said Commissioner and the said Secretary, in connection with the entry by the said Etherial T. Walker of the following described timber lands, to wit: The north half of the southeast quarter, the southwest quarter of the northeast quarter, and the southeast quarter of the northwest quarter of section fifteen, in township thirty-four north, and range five west, reference being had to the New Mexico principal meridian and base line, containing one hundred and sixty acres.

7. And the grand jurors aforesaid, upon their oath aforesaid, do further present that further in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said Charles H. Freeman afterwards, to wit, on the said eleventh day of October, in the same year eighteen hundred and ninety-nine, at Durango aforesaid, in the said district of Colorado, unlawfully did, by solicitation and promise of reward to her in the sum of seventy-five dollars, induce and procure one Rosa V. Walker to execute and verify by her oath before the said receiver a certain document in the form prescribed by law and entitled "Testimony of claimants," for presentation by the said Rosa V. Walker to the said register, and through the said register to the said Commissioner and the said Secretary, in connection with the entry by the said Rosa V. Walker, of the following-described timber lands, to wit: The west half of the northeast quarter, and the northeast quarter of the northwest quarter of section sixteen, and the southwest quarter of the southeast quarter of section nine, in township thirty-four north and range five west, reference being had to the New Mexico principal meridian and base line, containing one hundred and sixty acres.

8. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that further in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the
12 said Charles D. McPhee and John J. McGinnity afterwards, to wit, on the fifteenth day of May, in the year nineteen hundred and six, at the city of Denver, in the said district of Colorado, unlawfully did request and require the said William Barth to sign and execute a certain deed, to wit, a quitclaim of him the said William Barth, conveying the title to all the lands described in that part of this indictment where overt acts are charged to have been committed by the said Charles H. Freeman (being overt acts numbered one to seven, both inclusive) from him the said William Barth, as grantor, to the said The New Mexico Lumber Company, corporation as aforesaid, as grantee, which said deed, without the acknowledgement thereof, is of the tenor following, that is to say:

This deed, made this fifteenth day of May, in the year of our Lord one thousand nine hundred and six, between William Barth, of the county of Archuleta and State of Colorado, of the first part, and The New Mexico Lumber Company, a corporation, of the county of Archuleta and State of Colorado, of the second part,

Witnesseth that the said party of the first part, for and in consideration of the sum of one and no one-hundredths dollars to the said party of the first part in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, has remised, released, sold, conveyed, and quitclaimed, and by these *presence* does remise, release, sell, convey and quitclaim unto the said party of the second part, its successors, heirs, and assigns, forever, all the right, title, interest, claim, and demand which the said part, of the first part has in and to the following described real es-
13 tate situate, lying, and being in the county of Achuleta and State of Colorado, to wit: The south half of the northeast quarter and lots one and two in section one, township 34 north, range 3 west, N. M. P. M. Also the west half of the northeast quarter and the northeast quarter of the northwest quarter of section 16 U, and the southwest quarter of the southeast quarter of section 9 U, in township 34 N., range 5 W., N. M. P. M. Also the north half of the southeast quarter, and the southwest quarter of the northeast quarter and the southeast quarter of the northwest quarter, all in section 15 U, township 34 N., Range 5 W., N. M. P. M. Also the west half of the northeast quarter of section 9 U, and lots 3 & 4 in section 3 U, and lots 1 & 2 in section 4 U, all in township 34 N., range 5 W., N. M. P. M. Also the east half of the northeast quarter of section 16 U, and the northwest quarter of the northwest quarter of section 15 U, and the southeast quarter of the southeast quarter of section 9 U, all in township 34 N., Range 5 W., N. M. P. M. Also the southeast quarter of the northeast quarter and the northeast quarter of the southeast quarter of section 23 and the southwest quarter of the northwest quarter and the northwest quarter of the southwest quarter of section 24, all

in township 34 N., range 4 W., N. M. P. M. Also the east half of the southwest quarter and the southeast quarter of the northwest quarter and lot 3 in section one township 34 N., range 3 west, N. M. P. M.

To have and to hold the same, together with all and singular the appurtenances and privileges thereunto belonging or in anywise thereunto appertaining, and all the estate, right, title, interest, and claim whatsoever of the said party of the first part, either in law or equity, to the only proper use, benefit, and behoof of the said party of the second part, its successors and assigns forever.

In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written. This deed is given as correction for deed made June 1, 1900.

WILLIAM BARTH. [SEAL.]

14 And so the grand jurors aforesaid, upon their oath aforesaid, do say, that the said Edgar M. Biggs, Charles H. Freeman, Charles D. McPhee, and John J. McGinnity, on the said twenty-fifth day of August, in the year eighteen hundred and ninety-nine, and from thence hitherto, and at the several times of the committing of the said several overt acts in this indictment charged (the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, during all the time from the said day when the same was originally entered into, to wit, the said twenty-fifth day of August, in the year eighteen hundred and ninety-nine, to the date of the presenting of this indictment, being still continuing and in existence), in manner and form in this indictment aforesaid, unlawfully, corruptly, wickedly, and maliciously did conspire, combine, confederate, and agree together, and with others, indirectly, deceitfully, and fraudulently, to obtain from the said United States, for the said corporation, certain of the public lands and property of the said United States in quantity greatly in excess of the quantity which the said corporation could lawfully obtain directly from the said United States under a proper and lawful administration of the said laws and regulations, and thereby, and in that manner, defraud the said United States of its valuable property in such lands, and also of its governmental function in the matter of preserving and disposing of the same lands, as well as out of its right to administer
15 an intelligent and honest service in that behalf in the interests of the people of the said United States against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided.

EARL M. CRANSTON,
United States Attorney.

(Endorsed:) No. 2028. United States District Court. The United States of America v. Edgar M. Biggs, Charles H. Freeman, and John J. McGinnity, and Charles D. McPhee. Indictment. Conspiracy to defraud the United States, R. S., 5440 as amended. A true bill. E. D. Welker, foreman. Filed June 22, 1907. Charles W. Bishop, clerk.

16 Eighteenth day, November Term, Monday, November 25th, A. D. 1907.

Present: The Honorable Robert E. Lewis, district judge, and other officers as noted on the fifth day of November, A. D. 1907.

THE UNITED STATES OF AMERICA
vs.
EDGAR M. BIGGS, CHARLES H. FREEMAN, Charles D. McPhee, and John J. McGinnity. } 2028. Indictment for conspiracy.

At this day comes Earl M. Cranston, esquire, district attorney, who prosecutes the pleas of the United States in this behalf.

And thereupon, it is ordered by the court that the defendants plead to the indictment herein at the incoming of the court on Monday, the second day of December, A. D. 1907, and that the clerk of this court serve a certified copy of this order upon each of the defendants by registered mail, without delay.

In the District Court of the United States of America for the District of Colorado sitting at Denver.

UNITED STATES OF AMERICA,
District of Colorado, ss.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
17 EDGAR M. BIGGS, CHARLES H. FREEMAN, Charles D. McPhee, and John J. McGinnity, defendants. } No. 2028. Motion to quash.

And now come the defendants Charles D. McPhee and John J. McGinnity, in their own proper persons, severally into court here, and having heard read the said indictment heretofore and at the May term, A. D. 1907, of this honorable court found and filed against said defendants, do severally move the court to quash the said indictment and dismiss this cause against said defendants for the reason, as said defendants allege the facts to be and as appear as matters of record in this court of which this court takes judicial cognizance, that the grand jurors by whom said indictment was made and presented were not regularly or legally summoned, empaneled, and sworn as required by the laws of the United States governing such procedure, in this, to wit, that at the November (1906) term of this court, on the 24th day of April, A. D. 1907, the grand jury was ordered to be summoned from certain counties named in the order, and the clerk of this court, in the presence of the United States marshal of the district of Colorado, was ordered to draw by chance from the jury box the names of twenty-three persons, residents of the counties of Colorado named in said order, and to summon them to appear on Tuesday
18 the 14th day of May, A. D. 1907, at ten o'clock a. m. under a venire facias made returnable on that day. Thereupon the names of twenty-three persons were drawn by the said clerk, such names being fully set forth in the records of this court at page 350.

Thereafter and on the 14th day of May, A. D. 1907, the United States marshal of the district of Colorado made return of the venire facias aforesaid, showing that thereunder he had summoned twenty-one of the men to serve as said grand jurors. That the twenty-one individuals so summoned appeared on the return day aforesaid, and for good and sufficient reasons to the court appearing seven of said number were excused from further attendance upon the court at that term, leaving less than sixteen, to wit, fourteen of the individuals originally summoned. Thereafter upon these facts appearing to the court a special venire facias was issued on said day commanding the said marshal to summon seven good and lawful men to attend and serve as grand jurors until discharged, which said venire facias was made returnable on said 14th day of May, A. D. 1907, at two o'clock p. m. That thereafter the said marshal under said special venire facias, without drawing further names from the box, summoned from the city and county of Denver seven men whose names appear at page 415 of the records of this court. That the summoning of said seven individuals under the said special venire facias was contrary to law and the rules of this court. That the said individuals so summoned appeared, were duly sworn and empaneled with the fourteen
19 individuals of the original panel, and the twenty-one individuals so summoned, empaneled, and sworn constituted the grand jury which returned the said indictment herein.

CLYDE C. DAWSON,
CHARLES J. HUGHES, Jr.,
Attorneys for Defendants
John J. McGinnity and Charles D. McPhee.

(Endorsed:) Court No. 2028. In the District Court, District of Colorado. The United States of America, plaintiff, vs. Edgar M. Biggs et al., defendants. Motion to quash of Charles D. McPhee and John J. McGinnity. Filed Dec. 2, 1907. Charles W. Bishop, clerk. Charles J. Hughes, jr., Clyde C. Dawson, attorneys for defendants.

In the District Court of the United States of America for the District of Colorado sitting at Denver.

UNITED STATES OF AMERICA,
District of Colorado, ss:

THE UNITED STATES OF AMERICA, plaintiff, *vs.* EDGAR M. BIGGS, CHARLES H. FREEMAN, Charles D. McPhee and John J. McGinnity, defendants.	No. 2028.	Motion to quash.

20 And now comes the defendants, Edgar M. Biggs and Charles H. Freeman, in their own proper persons, severally into court here, and, having heard read the said indictment heretofore and at the

May term, A. D. 1907, of this honorable court found and filed against said defendants, do severally move the court to quash the said indictment and dismiss this cause against said defendants for the reason, as said defendants allege the facts to be and as appear as matters of record in this court of which this court takes judicial cognizance, that the grand jurors by whom said indictment was made and presented were not regularly or legally summoned, empaneled, and sworn as required by the laws of the United States governing such procedure, in this, to wit, that at the November (1906) term of this court, on the 24th day of April, A. D. 1907, the grand jury was ordered to be summoned from certain counties named in the order, and the clerk of this court, in the presence of the United States marshal of the District of Colorado, was ordered to draw by chance from the jury box the names of twenty-three persons, residents of the counties of Colorado named in said order, and to summon them to appear on Tuesday the 14th of May, A. D. 1907, at 10.00 o'clock a. m., under a venire facias made returnable on that day. Thereupon the names of twenty-three persons were drawn by the said clerk, such names
21 being fully set forth in the records of this court at page 350.

Thereafter and on the 14th day of May, A. D. 1907, the United States marshal of the District of Colorado made return of the venire facias aforesaid, showing that thereunder he had summoned twenty-one of the men to serve the said grand jurors. That the twenty-one individuals so summoned appeared on the return day aforesaid, and for good and sufficient reasons to the court appearing seven of said number were excused from further attendance upon the court at that term, leaving less than sixteen, to wit, fourteen of the individuals originally summoned. Thereafter upon these facts appearing to the court, a special venire facias was issued on said date commanding the said marshal to summon seven good and lawful men to attend and serve as grand jurors until discharged, which said venire facias was made returnable on said 14th day of May, A. D. 1907, at two o'clock p. m. That thereafter the said marshal under said special venire facias, without drawing further names from the box, summoned from the city and county of Denver seven men whose names appear at page 415 of the records of this court. That the summoning of said seven individuals under the said special venire facias was contrary to law and the rules of this court. That the said individuals so summoned appeared, were duly sworn and empaneled with the fourteen individuals of the original panel, and the twenty-
22 one individuals so summoned, empaneled, and sworn constituted the grand jury which returned the said indictment herein.

CLYDE C. DAWSON,
CHARLES J. HUGHES, JR.,
Attorneys for Defendants
Edgar M. Biggs and Charles H. Freeman.

(Endorsed:) Court No. 2028. In the District Court, District of Colorado. The United States of America, plaintiff, vs. Edgar M. Biggs et al., defendants. Motion to quash of Edgar M. Biggs and Charles H. Freeman. Filed Dec. 2, 1907. Charles W. Bishop, clerk. Charles J. Hughes, jr., Clyde C. Dawson, attorney for defendants.

In the District Court of the United States of America for the District of Colorado sitting at Denver.

UNITED STATES OF AMERICA,
District of Colorado, ss.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
EDGAR M. BIGGS, CHARLES H. FREEMAN, Charles D. McPhee, and John J. McGinnity, defendants. } No. 2028. Demurrer.

And the said defendants, Charles D. McPhee and John J.
23 McGinnity, in their own proper persons, severally come into court here and, having heard read the said indictment heretofore and at the May term, A. D. 1907, of this honorable court found and filed against said defendants, do severally say that the said indictment, and the matters therein contained, in the manner and form as the same are above and in said indictment stated and set forth, are not sufficient in law as against said defendants, Charles D. McPhee and John J. McGinnity, and each of them, and that they, the said Charles D. McPhee and John J. McGinnity, are not, and that each of them is not, bound by the law of the land to answer the same, and this said defendants, Charles D. McPhee and John J. McGinnity, are, and each of them is, ready to verify; wherefore for want of sufficient indictment in this behalf, the said defendants, Charles D. McPhee and John J. McGinnity, pray, and each of them prays, judgment, and that by the court they, and each of them, may be dismissed and discharged from the said premises in the said indictment specified.

And the said defendants, Charles D. McPhee and John J. McGinnity, in their own proper persons, further severally come into court here and, having heard read the said indictment, heretofore and at the May term, A. D. 1907, of this honorable court found and
24 filed against said defendants, do severally say that the said indictment, and the matters therein contained, in the manner and form as the same are above and in said indictment stated and set forth, are not sufficient in law as against said defendants, Charles D. McPhee and John J. McGinnity, and each of them, and that they, the said Charles D. McPhee and John J. McGinnity, are not, and that each of them is not, bound by the law of the land to answer the same, and particularly said defendants, Charles D. McPhee and John J. McGinnity, say, and each of them says:

A. That said indictment does not charge or set forth any crime or offense or the commission of any crime or offense by the defendants herein, or either or any of them, known to, or recognized by, any statute or statutes or law of the United States.

B. That said indictment does not charge or allege facts sufficient to constitute any crime or offense or the commission of any crime or offense by the defendants herein, or either or any of them, within the meaning of section 5440 of the Revised Statutes of the United States, or under any other statute or statutes of the United States, or at all, in that the formation of a conspiracy to commit an offense against the United States, or to defraud the United States, is not sufficiently set forth, or at all, nor the place and manner of forming the
25 alleged conspiracy, or the place and manner in which, and at which, the alleged conspiracy was entered into.

C. That said indictment is wholy insufficient in law, in that the averments and each of them contained in said indictment touching the alleged timber character of the lands forming the subject-matter of the alleged conspiracy, together with the lands which are alleged to have been entered in pursuance thereof, amount merely to a statement of an opinion or theory, and do not amount to a statement of the essential facts from which the actual character of said lands, or any of them, would appear.

D. That each and every general allegation contained in said indictment are mere statements of legal conclusions and fill no office other than obscuring the vital facts, and that taking the allegations in said indictment as a whole, it is manifest that the subject-matter of the supposed conspiracy does not in law involve a state of facts sufficient to constitute a criminal conspiracy under the provisions of said section 5440 of the Revised Statutes of the United States.

E. That said indictment is too vague, indefinite, and uncertain to require the said defendants, Charles D. McPhee and John J.
26 McGinnity, or either of them, to plead or answer thereto, in that:

1. Said indictment wholly fails to allege, set out, or describe with sufficient certainty, or at all, the terms of the alleged conspiracy, combination, confederacy, and agreement by said indictment alleged to have been entered into between the said defendants and the other defendants and divers other persons to said grand jurors unknown.

2. Said indictment wholly fails to allege, set out, or describe with sufficient certainty, or at all, the object of the alleged conspiracy, combination, confederacy, and agreement of said defendants with the other defendants and divers other persons to the said grand jurors unknown, on August 25th, 1899, or at any other time.

3. Said indictment wholly fails to allege, set out, or describe with sufficient certainty, or at all, that the object of the alleged conspiracy, combination, confederacy, and agreement of said defendants with the other defendants and divers other persons to the said grand jurors unknown, on August 25th, 1899, or at any other time, was to defraud the United States in any manner or for any purpose.

4. Said indictment wholly fails to allege, set out, or describe
27 with sufficient certainty, or at all, that on said 25th day of August, A. D. 1899, or at any other time, said defendants, together with the other defendants and divers other persons to the said grand jurors unknown, did unlawfully, corruptly, wickedly, and maliciously conspire, combine, confederate, and agree together to commit any offense against the United States, or to defraud the United States in any manner or for any purpose.

5. Said indictment wholly fails to allege or set out or describe with sufficient certainty, or at all, out of what right, title, or interest whatsoever of the United States in the said lands in said indictment described the defendants herein purposed to defraud the United States.

6. Said indictment wholly fails to allege or set out or describe with sufficient certainty what timber lands of the United States the defendants herein, together with divers other persons to the said grand jurors unknown, purposed and conspired indirectly to obtain from the United States for a certain corporation, to wit, The New Mexico Lumber Company, which the said corporation could not lawfully obtain directly from the said United States.

7. Said indictment wholly fails to allege or set out with sufficient certainty, or at all, the means by which it is claimed that the
28 defendants herein, together with divers other persons to the said grand jurors unknown, purposed and conspired to defraud the United States in any manner or for any purpose by indirectly obtaining from the United States for a certain corporation, to wit, The New Mexico Lumber Company, a large quantity of the timber lands in excess of the quantity of such lands which the said corporation could lawfully obtain directly from the said United States.

8. Said indictment wholly fails to allege, set out, or describe with sufficient certainty, or at all, what "persons aforesaid" for hire and under agreements with them separately to that end, the defendants herein, in pursuance of said alleged conspiracy to obtain said timber lands, were to solicit and procure, to pay to the receiver of the said land office with moneys to be furnished to them by the said corporation, the price fixed by law for said timber lands, make entries as individual entrymen, secure patents from said United States and make conveyances thereof to one William Barth.

9. Said indictment wholly fails to allege or set out with sufficient certainty, or at all, under what circumstances or in what manner or proceeding the alleged conspirators were to solicit and procure "the persons aforesaid" to enter said lands, to pay the price and secure patents therefor, and to convey the same to said William Barth,
29 and were to require said William Barth to convey said title to the said corporation.

10. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 1 on page 4 of said indictment referred to and designated as "testimony of claimant."

11. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 2 on page 5 of said indictment referred to and designated as "testimony of claimant."

12. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 3 on page 6 of said indictment referred to and designated as "testimony of claimant."

13. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 4 on page 6 of said indictment referred to and designated as "testimony of claimant."

14. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 5 on page 7 of said indictment referred to and designated as "testimony of claimant."

15. Said indictment wholly fails to allege, set out, or describe
30 with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 6 on page 7 of said indictment referred to and designated as "testimony of claimant."

16. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 7 on page 8 of said indictment referred to and designated as "testimony of claimant."

17. It can not be determined from the allegations of said indictment whether the alleged conspiracy is claimed to be unlawful in the ends sought to be attained by said conspiracy or in the means whereby said alleged conspiracy was to be accomplished.

18. It does not appear from said indictment, and said indictment wholly fails to allege, set out, and show that the alleged overt acts, and each of them, in paragraph numbered 1 on page 4, paragraph numbered 2 on pages 4 and 5, paragraph numbered 3 on page 5, paragraph numbered 4 on pages 5 and 6, paragraph numbered 5 on pages 6 and 7, paragraph numbered 6 on page 7, and paragraph numbered 7 on pages 7 and 8, respectively, of said indictment charged, alleged, and described, was an or any act done, induced, caused, or procured to be done by the said defendants or said conspirators, or any one or more of them in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederacy, and agreement, and to effect the object of the same, in said in-
31 dictment set forth and described, or an or any act contemplated in said original conspiracy to be done, induced, caused, or procured to be done by said defendants or said conspirators, or any one or more of them, in pursuance thereof.

19. It does not appear from said indictment, and said indictment wholly fails to allege, set out, and show that the alleged overt acts in paragraph numbered 8 on pages 8, 9, and 10 of said indictment charged, alleged, and described, wherein it is charged that "said Charles D. McPhee and John J. McGinnity afterwards, to wit, on

the fifteenth day of May, in the year nineteen hundred and six, at the city of Denver, in the said district of Colorado, unlawfully did request and require the said William Barth to sign and execute a certain deed, etc.," was an or any act done, induced, caused, or procured to be done by the said defendants or said conspirators, or any one or more of them, in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederacy, and agreement and to effect the object of the same, in said indictment set forth and described, or an or any act contemplated in said original conspiracy to be done, induced, caused, or procured to be done by said defendants or said conspirators or any one or more of them in pursuance thereof.

F. That said indictment is too vague, indefinite, and uncertain and fails to inform said defendants, Charles D. McPhee
32 and John J. McGinnity, or either of them, of the cause and nature of the accusation against them as required by Article VI of the amendments to the Constitution of the United States, in that:

1. Said indictment wholly fails to allege, set out, or describe with sufficient certainty, or at all, the terms of the alleged conspiracy, combination, confederacy, and agreement by said indictment alleged to have been entered into between the said defendants and the other defendants and divers other persons to said grand jurors unknown.

2. Said indictment wholly fails to allege, set out, or describe with sufficient certainty, or at all, the object of the alleged conspiracy, combination, confederacy, and agreement of said defendants with the other defendants and divers other persons to the said grand jurors unknown, on August 25th, 1899, or at any other time.

3. Said indictment wholly fails to allege, set out, or describe with sufficient certainty, or at all, that the object of the alleged conspiracy, combination, confederacy, and agreement of said defendants with the other defendants and divers other persons to the said grand jurors unknown, on August 25th, 1899, or at any other time, was to defraud the United states in any manner or for any purpose.

33 4. Said indictment wholly fails to allege, set out, or describe with sufficient certainty, or at all, that on said 25th day of August, A. D. 1899, or at any other time, said defendants, together with the other defendants and divers other persons to the said grand jurors unknown, did unlawfully, corruptly, wickedly, and maliciously conspire, combine, confederate, and agree together to commit any offense against the United States, or to defraud the United States in any manner or for any purpose.

5. Said indictment wholly fails to allege or set out or describe with sufficient certainty, or at all, out of what right, title, or interest whatsoever of the United States in the said lands in said indictment described the defendants herein purposed to defraud the United States.

6. Said indictment wholly fails to allege or set out or describe with sufficient certainty what timber lands of the United States the defendants herein, together with divers other persons to the said

grand jurors unknown, purposed and conspired indirectly to obtain from the United States for a certain corporation, to wit, The New Mexico Lumber Company, which the said corporation could not lawfully obtain directly from the said United States.

7. Said indictment wholly fails to allege or set out with sufficient certainty, or at all, the means by which it is claimed
34 that the defendants herein, together with divers other persons to the said jurors unknown, purposed and conspired to defraud the United States in any manner or for any purpose by indirectly obtaining from the United States for a certain corporation, to wit, The New Mexico Lumber Company, a large quantity of the timber lands in excess of the quantity of such lands which the said corporation could lawfully obtain directly from the said United States.

8. Said indictment wholly fails to allege, set out, or describe with sufficient certainty, or at all, what " persons aforesaid " for hire and under agreements with them separately to that end, the defendants herein, in pursuance of said alleged conspiracy to obtain said timber lands, were to solicit and procure, to pay to the receiver of the said land office with moneys to be furnished to them by the said corporation, the price fixed by law for said timber lands, make entries as individual entrymen, secure patents from said United States, and make conveyances thereof to one William Barth.

9. Said indictment wholly fails to allege or set out with sufficient certainty, or at all, under what circumstances or in what manner or proceeding the alleged conspirators were to solicit and pro-
35 cure " the persons aforesaid " to enter said lands, to pay the price and secure patents therefor, and to convey the same to said William Barth, and were to require said William Barth to convey said title to the said corporation.

10. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 1 on page 4 of said indictment referred to and designated as " testimony of claimant."

11. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 2 on page 5 of said indictment referred to and designated as " testimony of claimant."

12. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 3 on page 6 of said indictment referred to and designated as " testimony of claimant."

13. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 4 on page 6 of said indictment referred to and designated as " testimony of claimant."

14. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 5 on page 7 of said indictment referred to and designated as " testimony of claimant."

36 15. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 6 on page 7 of said indictment referred to and designated as "testimony of claimant."

16. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 7 on page 8 of said indictment referred to and designated as "testimony of claimant."

17. It can not be determined from the allegations of said indictment whether the alleged conspiracy is claimed to be unlawful in the ends sought to be attained by said conspiracy or in the means whereby said alleged conspiracy was to be accomplished.

18. It does not appear from said indictment, and said indictment wholly fails to allege, set out, and show that the alleged overt acts, and each of them, in paragraph numbered 1 on page 4, paragraph numbered 2 on pages 4 and 5, paragraph numbered 3 on page 5, paragraph numbered 4 on pages 5 and 6, paragraph numbered 5 on pages 6 and 7, paragraph numbered 6 on page 7, and paragraph numbered 7 on pages 7 and 8, respectively, of said indictment charged, alleged, and described, was an or any act done, induced, caused, or procured to be done by the said defendants or said conspirators, or any one or more of them, in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination,
37 confederacy, and agreement and to effect the object of the same, in said indictment set forth and described, or an or any act contemplated in said original conspiracy to be done, induced, caused, or procured to be done by said defendants or said conspirators, or any one or more of them, in pursuance thereof.

19. It does not appear from said indictment, and said indictment wholly fails to allege, set out, and show that the alleged overt act in paragraph numbered 8 on pages 8, 9, and 10 of said indictment charged, alleged, and described, wherein it is charged that "said Charles D. McPhee and John J. McGinnity afterwards, to wit, on the fifteenth day of May, in the year nineteen hundred and six, at the city of Denver, in the said district of Colorado, unlawfully did request and require the said William Barth to sign and execute a certain deed, etc.," was an or any act done, induced, caused, or procured to be done by the said defendants or said conspirators, or any one or more of them, in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederacy, and agreement and to effect the object of the same, in said indictment set forth and described, or an or any act contemplated in said original conspiracy to be done, induced, caused, or procured to be done by said defendants or said conspirators, or any one or more of them, in pursuance thereof.

38 G. That it does not appear that the said indictment was found or filed, and said indictment was not found or filed, in this or in any court within three years next after the alleged offense and offenses set forth and alleged in said indictment are alleged to

have been committed, nor within three years next after the commission of any alleged offense in said indictment specified, though during the whole time since the allege commission of said alleged offenses said defendants, Charles D. McPhee and John J. McGinnity, have never, and each of them has never, fled from justice, and are not and is not now fleeing from justice; and this the said defendants, Charles D. McPhee and John J. McGinnity, are, and each of them is, ready to verify.

Wherefore, for want of sufficient indictment in this behalf, the said defendants, Charles D. McPhee and John J. McGinnity, pray, and each of them prays, judgment, and that by the court they, and each of them, may be dismissed and discharged from the said premises in the said indictment specified.

CLYDE C. DAWSON,
CHARLES J. HUGHES, JR.,
Attorneys for Charles D. McPhee and John J. McGinnity.

STATE OF COLORADO,
City and county of Denver, ss.

39 JOHN J. McGINNITY, being first duly sworn upon oath, deposes and says: That he is one of the defendants above named; that he has heard read the foregoing demurrer and knows the contents thereof, and that the statements of facts therein made and contained are true of his own knowledge.

JOHN J. McGINNITY.

Subscribed and sworn to before me this 30th day of November, A. D. 1907.

My commission expires January 25, 1909.

[Notarial seal] WILLIAM W. HEINEMANN, *Notary Public.*

(Endorsed.) Court No. 2028. In the District Court, District of Colorado. The United States of America, plaintiff, vs. Edgar M. Biggs, et al., defendants. Demurrer of Charles D. McPhee and John J. McGinnity. Filed Dec. 2, 1907. Charles W. Bishop, clerk; Charles J. Hughes, jr., Clyde C. Dawson, attorneys for defendants.

In the District Court of the United States of America for the District of Colorado sitting at Denver.

UNITED STATES OF AMERICA,
District of Colorado, ss.

40 THE UNITED STATES OF AMERICA, plaintiff,
vs.
EDGAR M. BIGGS, CHARLES H. FREEMAN, Charles D. McPhee, and John J. McGinnity, defendants.
No. 2028. Demurrer.

And the said defendants, Edgar M. Biggs and Charles H. Freeman, in their own proper persons, severally come into court here, and having heard read the said indictment, heretofore and at the May term, A. D. 1907, of this honorable court found and filed against said defendants, do severally say that the said indictment, and the matters therein contained, in the manner and form as the same are above and in said indictment stated and set forth, are not sufficient in law as against said defendants, Edgar M. Biggs and Charles H. Freeman, and each of them, and that they, the said Edgar M. Biggs and Charles H. Freeman, are not, and that each of them is not, bound by the law of the land to answer the same; and this said defendants, Edgar M. Biggs and Charles H. Freeman, are, and each of them is, ready to verify; wherefore, for want of sufficient indictment in this behalf, the said defendants, Edgar M. Biggs and Charles H. Freeman, pray, and each of them prays, judgment, and that by the court they, and each of them, may be dismissed and discharged from the said premises in the said indictment specified.

41 And the said defendants, Edgar M. Biggs and Charles H. Freeman, in their own proper persons, further severally come into court here, and having heard read the said indictment, heretofore and at the May term, A. D. 1907, of this honorable court found and filed against said defendants, do severally say that the said indictment, and the matters therein contained, in the manner and form as the same are above and in said indictment stated and set forth, are not sufficient in law as against said defendants, Edgar M. Biggs and Charles H. Freeman, and each of them, and that they, the said Edgar M. Biggs and Charles H. Freeman, are not, and that each of them is not, bound by the law of the land to answer the same, and particularly said defendants, Edgar M. Biggs and Charles H. Freeman, say, and each of them says:

A. That said indictment does not charge or set forth any crime or offense or the commission of any crime or offense by the defendants herein, or either or any of them, known to, or recognized by, any statute or statutes or law of the United States.

B. That said indictment does not charge or allege facts sufficient to constitute any crime or offense or the commission of any crime or offense by the defendants herein, or either or any of them, within the meaning of section 5440 of the Revised Statutes of the United

42 States, or under any other statute or statutes of the United States, or at all, in that the formation of a conspiracy to commit an offense against the United States, or to defraud the United States, is not sufficiently set forth, or at all, nor the place and manner

of forming the alleged conspiracy, or the place and manner in which, and at which, the alleged conspiracy was entered into.

C. That said indictment is wholly insufficient in law, in that the averments, and each of them, contained in said indictment touching the alleged timber character of the lands forming the subject-matter of the alleged conspiracy, together with the lands which are alleged to have been entered in pursuance thereof, amount merely to a statement of an opinion or theory, and do not amount to a statement of the essential facts from which the actual character of said lands, or any of them, would appear.

D. That each and every general allegation contained in said indictment are mere statements of legal conclusions and fill no office other than obscuring the vital facts, and that taking the allegations in said indictment as a whole, it is manifest that the subject-matter of the supposed conspiracy does not in law involve a state of facts sufficient to constitute a criminal conspiracy under the provisions of said section 5440 of the Revised Statutes of the United States.

E. That said indictment is too vague, indefinite, and
43 uncertain to require the said defendants, Edgar M. Biggs and Charles H. Freeman, or either of them, to plead or answer thereto, in that:

1. Said indictment wholly fails to allege, set out, or describe with sufficient certainty, or at all, the terms of the alleged conspiracy, combination, confederacy, and agreement by said indictment alleged to have been entered into between the said defendants and the other defendants and divers other persons to said grand jurors unknown.

2. Said indictment wholly fails to allege, set out, or describe with sufficient certainty, or at all, the object of the alleged conspiracy, combination, confederacy, and agreement of said defendants with the other defendants and divers other persons to the said grand jurors unknown, on August 25th, 1899, or at any other time.

3. Said indictment wholly fails to allege, set out, or describe with sufficient certainty, or at all, that the object of the alleged conspiracy, combination, confederacy, and agreement of said defendants with the other defendants and divers other persons to the said grand jurors unknown, on August 25th, 1899, or at any other time, was to defraud the United States in any manner or for any purpose.

4. Said indictment wholly fails to allege, set out, or
44 describe with sufficient certainty, or at all, that on said 25th day of August, A. D. 1899, or at any other time, said defendants, together with the other defendants and divers other persons to the said grand jurors unknown, did unlawfully, corruptly, wickedly, and maliciously conspire, combine, confederate, and agree together to commit any offense against the United States, or to defraud the United States in any manner or for any purpose.

5. Said indictment wholly fails to allege or set out or describe with sufficient certainty, or at all, out of what right, title, or interest whatsoever of the United States in the said lands in said indictment described the defendants herein purposed to defraud the United States.

6. Said indictment wholly fails to allege or set out or describe with sufficient certainty what timber lands of the United States the defendants herein, together with divers other persons to the said grand jurors unknown, purposed and conspired indirectly to obtain from the United States for a certain corporation, to wit, The New Mexico Lumber Company, which the said corporation could not lawfully obtain directly from the said United States.

7. Said indictment wholly fails to allege or set out with sufficient certainty, or at all, the means by which it is claimed that the
45 defendants herein, together with divers other persons to the said grand jurors unknown, purposed and conspired to defraud the United States in any manner or for any purpose by indirectly obtaining from the United States for a certain corporation, to wit, The New Mexico Lumber Company, a large quantity of the timber lands in excess of the quantity of such lands which the said corporation could lawfully obtain directly from the said United States.

8. Said indictment wholly fails to allege, set out, or describe with sufficient certainty, or at all, what "persons aforesaid" for hire and under agreements with them separately to that end, the defendants herein, in pursuance of said alleged conspiracy to obtain said timber lands, were to solicit and procure, to pay to the receiver of the said land office, with moneys to be furnished to them by the said corporation, the price fixed by law for said timber lands, make entries as individual entrymen, secure patents from said United States, and make conveyances thereof to one William Barth.

9. Said indictment wholly fails to allege or set out with sufficient certainty, or at all, under what circumstances or in what manner or proceeding the alleged conspirators were to solicit and procure "the persons aforesaid" to enter said lands, to pay the price and secure patents therefor, and to convey the same to said William Barth,
46 and were to require said William Barth to convey said title to the said corporation.

10. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 1 on page 4 of said indictment referred to and designated as "testimony of claimant."

11. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 2 on page 5 of said indictment referred to and designated as "testimony of claimant."

12. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 3 on page 6 of said indictment referred to and designated as "testimony of claimant."

13. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in

paragraph numbered 4 on page 6 of said indictment referred to and designated as "testimony of claimant."

14. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 5 on page 7 of said indictment referred to and designated as "testimony of claimant."

15. Said indictment wholly fails to allege, set out, or de-
47 scribe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 6 on page 7 of said indictment referred to and designated as "testimony of claimant."

16. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 7 on page 8 of said indictment referred to and designated as "testimony of claimant."

17. It cannot be determined from the allegations of said indictment whether the alleged conspiracy is claimed to be unlawful in the ends sought to be attained by said conspiracy or in the means whereby said alleged conspiracy was to be accomplished.

18. It does not appear from said indictment, and said indictment wholly fails to allege, set out, and show that the alleged overt acts, and each of them, in paragraph numbered 1 on page 4, paragraph numbered 2 on pages 4 and 5, paragraph numbered 3 on page 5, paragraph numbered 4 on pages 5 and 6, paragraph numbered 5 on pages 6 and 7, paragraph numbered 6 on page 7, and paragraph numbered 7 on pages 7 and 8, respectively, of said indictment charged, alleged, and described, was an or any act done, induced, caused, or procured to be done by the said defendants or said conspirators, or any one or more of them in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederacy, and agreement and to effect the object of the same, in said indictment set forth and
48 described, or an or any act contemplated in said original conspiracy to be done, induced, caused, or procured to be done by said defendants or said conspirators, or any one or more of them, in pursuance thereof.

19. It does not appear from said indictment, and said indictment wholly fails to allege, set out, and show that the alleged overt act in paragraph numbered 8, on pages 8, 9, and 10 of said indictment charged, alleged, and described, wherein it is charged that "said Charles D. McPhee and John J. McGinnity afterwards—to wit, on the fifteenth day of May, in the year nineteen hundred and six, at the city of Denver, in the said district of Colorado—unlawfully did request and require the said William Barth to sign and execute a certain deed, etc.," was an or any act done, induced, caused, or procured to be done by the said defendants or said conspirators, or any one or more of them, in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederacy, and agreement and to effect the object of the same, in said indictment set forth and described, or an or any act contemplated in said original conspiracy to

be done, induced, caused, or procured to be done by said defendants or said conspirators or any one or more of them in pursuance thereof.

F. That said indictment is too vague, indefinite, and uncertain and fails to inform said defendants, Edgar M. Biggs and
49 Charles H. Freeman, or either of them, of the cause and nature of the accusation against them as required by Article VI of the amendments of the Constitution of the United States, in that:

1. Said indictment wholly fails to allege, set out, or describe with sufficient certainty, or at all, the terms of the alleged conspiracy, combination, confederacy, and agreement by said indictment alleged to have been entered into between the said defendants and the other defendants and divers other persons to said grand jurors unknown.

2. Said indictment wholly fails to allege, set out, or describe with sufficient certainty, or at all, the object of the alleged conspiracy, combination, confederacy, and agreement of said defendants with the other defendants and divers other persons to the said grand jurors unknown, on August 25th, 1899, or at any other time.

3. Said indictment wholly fails to allege, set out, or describe with sufficient certainty, or at all, that the object of the alleged conspiracy, combination, confederacy, and agreement of said defendants with the other defendants and divers other persons to the said grand jurors unknown, on August 25th, 1899, or at any other time, was to defraud the United States in any manner or for any purpose.

50 4. Said indictment wholly fails to allege, set out, or describe with sufficient certainty, or at all, that on said 25th day of August, A. D. 1899, or at any other time, said defendants, together with the other defendants and divers other persons to the said grand jurors unknown, did unlawfully, corruptly, wickedly, and maliciously conspire, combine, confederate, and agree together to commit any offense against the United States, or to defraud the United States in any manner or for any purpose.

5. Said indictment wholly fails to allege or set out or describe with sufficient certainty, or at all, out of what right, title, or interest whatsoever of the United States in the said lands in said indictment described the defendants herein purposed to defraud the United States.

6. Said indictment wholly fails to allege or set out or describe with sufficient certainty what timber lands of the United States the defendants herein, together with divers other persons to the said grand jurors unknown, purposed and conspired indirectly to obtain from the United States for a certain corporation, to wit, The New Mexico Lumber Company, which the said corporation could not lawfully obtain directly from the said United States.

7. Said indictment wholly fails to allege or set out with sufficient certainty, or at all, the means by which it is claimed that the
51 defendants herein, together with divers other persons to the said grand jurors unknown, purposed and conspired to defraud the United States in any manner or for any purpose by indi-

rectly obtaining from the United States for a certain corporation, to wit, The New Mexico Lumber Company, a large quantity of the timber lands in excess of the quantity of such lands which the said corporation could lawfully obtain directly from the said United States.

8. Said indictment wholly fails to allege, set out, or describe with sufficient certainty, or at all, what "persons aforesaid" for hire and under agreements with them separately to that end, the defendants herein, in pursuance of said alleged conspiracy to obtain said timber lands, were to solicit and procure, to pay to the receiver of the said land office with moneys to be furnished to them by the said corporation, the price fixed by law for said timber lands, make entries as individual entrymen, secure patents from said United States and make conveyances thereof to one William Barth.

9. Said indictment wholly fails to allege or set out with sufficient certainty, or at all, under what circumstances or in what manner or proceeding the alleged conspirators were to solicit and procure "the persons aforesaid" to enter said lands, to pay the price and secure patents therefor, and to convey the same to said William
52 Barth, and were to require said William Barth to convey said title to the said corporation.

10. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 1, on page 4 of said indictment referred to, and designated as "Testimony of claimant."

11. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 2, on page 5 of said indictment referred to, and designated as "Testimony of claimant."

12. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 3, on page 6 of said indictment referred to, and designated as "Testimony of claimant."

13. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 4, on page 6 of said indictment referred to, and designated as "Testimony of claimant."

14. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 5, on page 7 of said indictment referred to, and designated as "Testimony of claimant."

15. Said indictment wholly fails to allege, set out, or de-
53 scribe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 6, on page 7 of said indictment referred to, and designated as "Testimony of claimant."

16. Said indictment wholly fails to allege, set out, or describe with sufficient accuracy or certainty, or at all, that certain document in paragraph numbered 7, on page 8 of said indictment referred to, and designated as "Testimony of claimant."

17. It can not be determined from the allegations of said indictment whether the alleged conspiracy is claimed to be unlawful in the ends sought to be attained by said conspiracy or in the means whereby said alleged conspiracy was to be accomplished.

18. It does not appear from said indictment, and said indictment wholly fails to allege, set out, and show that the alleged overt acts, and each of them, in paragraph numbered 1, on page 4, paragraph numbered 2, on pages 4 and 5, paragraph numbered 3, on page 5, paragraph numbered 4, on pages 5 and 6, paragraph numbered 5, on pages 6 and 7, paragraph numbered 6, on page 7, and paragraph numbered 7, on pages 7 and 8, respectively, of said indictment charged, alleged, and described, was an or any act done, induced, caused, or procured to be done by the said defendants or said conspirators, or any one or more of them in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederacy, and agreement and to effect the object of the same, in said indictment set forth
54 and described, or an or any act contemplated in said original conspiracy to be done, induced, caused, or procured to be done by said defendants or said conspirators, or any one or more of them, in pursuance thereof.

19. It does not appear from said indictment, and said indictment wholly fails to allege, set out, and show that the alleged overt act in paragraph numbered 8 on pages 8, 9, and 10 of said indictment charged, alleged and described, wherein it is charged that "said Charles D. McPhee and John J. McGinnity, afterwards, to wit, on the fifteenth day of May, in the year nineteen hundred and six, at the city of Denver, in the said district of Colorado, unlawfully did request and require the said William Barth to sign and execute a certain deed, etc.," was an or any act done, induced, caused, or procured to be done by the said defendants or said conspirators, or any one or more of them, in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederacy, and agreement and to effect the object of the same, in said indictment set forth and described, or an or any act contemplated in said original conspiracy to be done, induced, caused, or procured to be done by said defendants or said conspirators or any one or more of them in pursuance thereof.

G. That it does not appear that the said indictment was
55 found or filed, and said indictment was not found or filed in this or in any court within three years next after the alleged offense and offenses set forth and alleged in said indictment are alleged to have been committed, nor within three years next after the commission of any alleged offense in said indictment specified, though during the whole time since the alleged commission of said alleged offenses said defendants, Edgar M. Biggs and Charles H. Freeman, have never, and each of them has never, fled from justice, and are not, and is not, now fleeing from justice; and this the said defendants, Edgar M. Biggs and Charles H. Freeman, are, and each of them is, ready to verify;

Wherefore, for want of sufficient indictment in this behalf, the said defendants, Edgar M. Biggs and Charles H. Freeman, pray, and each of them prays, judgment, and that by the court they, and each of them, may be dismissed and discharged from the said premises in the said indictment specified.

CLYDE C. DAWSON,
CHARLES J. HUGHES, Jr.,
Attorneys for Edgar M. Biggs and Charles H. Freeman.

STATE OF COLORADO,
City and county of Denver, ss.

56 EDGAR M. BIGGS, being first duly sworn upon oath, deposes and says: That he is one of the defendants above named; that he has heard read the foregoing demurrer and knows the contents thereof, and that the statements of facts therein made and contained are true of his own knowledge.

EDGAR M. BIGGS.

Subscribed and sworn to before me this 30 day of November, A. D. 1907.

My commission expires January 25, 1909.

[NOTARIAL SEAL.] WILLIAM W. HEINEMANN,
Notary Public.

STATE OF COLORADO,
City and county of Denver, ss:

CHARLES H. FREEMAN, being first duly sworn upon oath, deposes and says: That he is one of the defendants above named; that he has heard read the foregoing demurrer and knows the contents thereof, and that the statements of facts therein made and contained are true of his own knowledge.

CHARLES H. FREEMAN.

Subscribed and sworn to before me this 30th day of November, A. D. 1907.

My commission expires January 25, 1909.

[NOTARIAL SEAL.] WILLIAM W. HEINEMANN,
Notary Public.

57 (Endorsed:) Court No. 2028. In the District Court, district of Colorado. The United States of America, plaintiff, vs. Edgar M. Biggs, et al., defendants. Demurrer of Edgar M. Biggs and Charles H. Freeman. Filed Dec. 2, 1907. Charles W. Bishop, clerk. Charles J. Hughes, jr., Clyde C. Dawson, attorneys for defendants.

In the District Court of the United States of America for the District of Colorado sitting at Denver.

UNITED STATES OF AMERICA,
District of Colorado, ss:

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
EDGAR M. BIGGS, CHARLES H. FREEMAN, Charles D. McPhee and John J. McGinnity, defendants. } No. 2028. Affidavit.

STATE OF COLORADO,
City and county of Denver, ss:

JOHN J. MCGINNITY, being first duly sworn upon his oath, deposes and says: That he is one of the defendants in the above entitled cause now pending in this court; that he has heard read the demurrer of the defendants, Charles D. McPhee and John J. McGinnity, filed herewith in this court in said cause, and knows the contents
58 thereof; that during all of the times mentioned in the said indictment filed in said cause, and at the time first mentioned therein, to wit, August 25th, 1899, and ever since that time, affiant has been personally acquainted with said defendant, Charles D. McPhee; that during all of the times mentioned in the said indictment filed herein, and at the time first mentioned therein, to wit, August 25th, 1899, and ever since that time continuously, the said defendant Charles D. McPhee has been, and now is, a citizen and resident of the State of Colorado, and has during said entire period of time resided and lived in the State of Colorado, and that said defendant Charles D. McPhee has never been, and is not now, a fugitive from justice in any way, nor has he ever at any time fled, nor is he now fleeing, from justice, and that his whereabouts in the State of Colorado have never been, and are not now, concealed, and were, and are, well known to the people of the State of Colorado and the prosecuting officers of the United States Government.

JOHN J. MCGINNITY.

Subscribed and sworn to before me this 30th day of November, A. D. 1907.

My commission expires January 25, 1909.

[NOTARIAL SEAL.] WILLIAM W. HEINEMANN,
Notary Public.

59 (Endorsed:) Court No. 2028. In the District Court, district of Colorado. The United States of America, plaintiff, vs. Edgar M. Biggs et al., defendants. Affidavit of John J. McGinnity, Filed Dec. 2, 1907. Charles W. Bishop, clerk. Charles J. Hughes, jr., Clyde C. Dawson, attorneys for defendants.

Thirtieth day, November term, Tuesday, December 10th, A. D. 1907.

Present: The Honorable Robert E. Lewis, district judge, and other officers as noted on the fifth day of November, A. D. 1907.

THE UNITED STATES OF AMERICA *vs.* EDGAR M. BIGGS, CHARLES H. FREEMAN, Charles D. McPhee, and John J. McGinnity.	2028. Indictment for conspiracy.

At this day comes Ernest Knaebel, esquire, assistant to the Attorney-General, who prosecutes the pleas of the United States in this behalf, and the defendants by Clyde C. Dawson, esquire, and C. J. Hughes, junior, esquire, their attorneys, also come.

And the several motions of the defendants Edgar M. Biggs and Charles H. Freeman to quash the indictment herein, and of the defendants Charles D. McPhee and John J. McGinnity to quash the indictment herein; and the joint and several demurrers of the defendants Edgar M. Biggs and Charles H. Freeman to the in-
60 dictment herein, and of the defendants Charles D. McPhee and John J. McGinnity to the indictment herein, coming on now to be heard, are argued by counsel to the hour or adjournment.

Thirty-first day, November term, Wednesday, December 11th, A. D. 1907.

Present: The Honorable Robert E. Lewis, district judge, and other officers as noted on the fifth day of November, A. D. 1907.

THE UNITED STATES OF AMERICA *vs.* EDGAR M. BIGGS, CHARLES H. FREEMAN, Charles D. McPhee, and John J. McGinnity.	2028. Indictment for conspiracy.

At this day comes Ernest Knaebel, esquire, assistant to the Attorney-General, who prosecutes the pleas of the United States in this behalf, and the defendants by Clyde C. Dawson, esquire, and C. J. Hughes, junior, esquire, their attorneys, also come.

And the several motions of the defendants Edgar M. Biggs and Charles H. Freeman to quash the indictment herein, and of the defendants Charles D. McPhee and John J. McGinnity to quash the indictment herein, and the joint and several demurrers of the defendants Edgar M. Biggs and Charles H. Freeman to the indictment herein, and of the defendants Charles D. McPhee and John J. McGinnity herein, coming on now to be heard, are argued by counsel and by the court taken under advisement.

61 Thirty-eighth Day, November term, Tuesday, December 24th, A. D. 1907.

Present: The Honorable Robert E. Lewis, district judge, and other officers as noted on the fifth day of November, A. D. 1907.

THE UNITED STATES OF AMERICA, *vs.* EDGAR M. BIGGS, CHARLES H. FREEMAN, Charles D. McPhee, and John J. McGinnity.	2028. Indictment for Conspiracy.

At this day comes Ralph Hartzell, esquire, assistant district attorney, who prosecutes the pleas of the United States in this behalf, and the defendants, by Charles J. Hughes, junior, esquire, their attorney, also come. And the separate demurrer of the defendants Edgar M. Biggs and Charles H. Freeman, and of Charles D. McPhee and John J. McGinnity, and the several motions of defendants Edgar M. Biggs and Charles H. Freeman, and of Charles D. McPhee and John J. McGinnity, to quash the indictment herein, having heretofore come on to be heard, and having been argued by Ernest Knaebel, esquire, assistant to the Attorney-General, and by Charles J. Hughes, junior, esquire, and Clyde C. Dawson, esquire, attorneys for the defendants, and having been taken under advisement, and the court having considered the same and being now fully advised in the premises,

it seemeth to the court now here that the indictment herein is
62 not sufficient in law to be answered unto, and so the said demurrers, and each thereof, be, and the same are hereby, sustained; and that the said motions to quash, and each thereof, be and the same are hereby, granted, and that the indictment herein be, and the same is hereby, quashed.

To which order and ruling of the court the plaintiff excepts, and an exception is hereby allowed to it.

Forty-sixth Day, November term, Monday, January 6th, A. D. 1908.

Present: The Honorable Robert E. Lewis, district judge, and other officers as noted on the fifth day of November, A. D. 1907.

THE UNITED STATES OF AMERICA, *vs.* EDGAR M. BIGGS, CHARLES H. FREEMAN, Charles D. McPhee, and John J. McGinnity.	2028. Indictment for Conspiracy.

At this day comes Ernest Knaebel, esquire, special assistant to the Attorney-General, who prosecutes the pleas of the United States in this behalf, and the defendants, by Charles J. Hughes, junior, esquire, and Clyde C. Dawson, esquire, their attorneys, also come. And it

now appearing to the court that the order heretofore, and on the twenty-fourth day of December, A. D. 1907, at this same term, entered herein is erroneous, it is ordered by the court that said
63 order be, and the same is hereby, vacated, set aside, and for naught held, and that the following stand in the place and stead thereof, to wit:

It is now ordered that the motions to quash the indictment herein be, and they hereby are, overruled, and that for the reasons and upon the grounds stated in the opinion filed in this cause, on the twenty-fourth day of December last, the demurrers of the defendants, including the defenses therein set up based upon the statute of limitations (the legal sufficiency of which defenses in substance admitting the matters of fact therein alleged was drawn in question by the plaintiff at the argument), be, and they hereby are, sustained.

It is further ordered that, for the reasons and grounds aforesaid, set forth in the said opinion, the indictment in this cause be, and the same hereby is, quashed.

Wherefore, it is considered, ordered, and adjudged by the court that the defendants of and from the premises in this said indictment specified be discharged and go hence hereof without day.

It is further ordered by the court that if the United States shall sue out a writ of error to the Supreme Court of the United States from this order and judgment, the defendants shall each enter into a personal recognizance before an United States commissioner in
64 the sum of one thousand dollars ($1,000) conditioned that he shall personally appear in this court on the first day of the next term thereof at Denver, and from day to day and from term to term thereafter, and answer the indictment herein if the judgment herein shall be reversed by the said Supreme Court. And until such recognizances shall have been duly executed and filed with the clerk of this court the existing recognizances now on file in this case shall be and remain binding upon the defendants and their respective sureties.

To which order and judgment, sustaining the said demurrers and quashing the said indictment, the plaintiff then and there at the time thereof excepted, and an exception was allowed to it.

65 In the District Court of the United States for the District of Colorado.

United States of America, plaintiff, *vs.* Edgar M. Biggs, Charles H. Freeman, Charles D. McPhee and John J. McGinnity, defendants.	No. 2028.

Bill of exceptions.

Be it remembered that on the 2nd day of December, 1907, in this cause, the defendants Edgar M. Biggs and Charles H. Freeman filed their demurrer to the indictment, and the defendants Charles D.

McPhee and John J. McGinnity likewise filed their demurrer to the indictment, in which demurrers, and each thereof, were included and alleged, among other defenses, the special affirmative defences of the respective defendants so filing the same, setting up the statute of limitations (Rev. Stat., sec. 1044) as a bar to the prosecution, in connection with, and supported by verified affirmative allegations, in substance and effect averring that such defendants were not, and had not been, persons fleeing from justice, within the meaning of the exception to that statute, provided by sec. 1045 of the Revised Statutes. And on the same day last aforesaid, in corroboration and support of such special defence, and affirmative allegations, as to the defendant Charles D. McPhee, there was filed in his behalf in this cause the affidavit of the defendant John J. McGinnity,
66 which said demurrers, together with the aforesaid special defences so therewith alleged, and which said affidavit, are all set forth in words and figures in the transcript of the record proper of this cause at pages 22 to 59 of such transcript, as the said transcript is prepared and will be duly certified to the Supreme Court pursuant to the writ of error to be sued out by the United States for the review of the judgment and decision herein in that court: and in lieu of setting forth the said demurrers with the aforesaid special defenses so pleaded therewith, at large in this bill of exceptions, reference is hereby made to that part of the said transcript where they so appear, and the same are by this reference taken and considered as a part of this bill of exceptions as though here fully extended.

And on the 10th and 11th days of December, 1907, before the court, Hon. Robert E. Lewis, district judge, presiding, and Charles J. Hughes, jr., esquire, and Clyde C. Dawson, esquire, appearing as counsel for the defendants, and Ernest Knaebel, special assistant to the Attorney-General, appearing for the United States, this cause came on to be heard upon the indictment herein, and the said demurrers thereto, and the said special defences thereto, and was argued by counsel, the truth of the said affirmative allegations of fact alleged, as aforesaid, in connection with said special defences to show that the said defendants had not been fugitives from justice being admitted, but the legal sufficiency in substance of such defences being drawn in question by counsel for the United States at the argument.

And thereafter, on the 24th day of December, 1907, the said court made its decision and order upon the matters so heard and argued, sustaining the said demurrers and special defences, upon the grounds and for the reasons, and those only, set forth in a certain written opinion then filed by the court in this cause, which opinion is in words and figures as follows:

67 In the District Court of the United States for the District of Colorado.

UNITED STATES OF AMERICA, PLAINTIFF,
v.
EDGAR M. BIGGS, ET AL., DEFENDANTS.
No. 2028. R. S. U. S., sec. 5440.

The indictment in this case attempts to charge a conspiracy, and is bottomed upon R. S. U. S., sec. 5440, and the second clause thereof, to wit, "If two or more persons conspire * * * to defraud the United States in any manner, or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy," etc.

The indictment charges that the defendants Biggs, Freeman, McPhee, and McGinnity "on the twenty-fifth day of August in the year eighteen hundred and ninety-nine, and at the several times of the committing of the several overt acts hereafter in this indictment mentioned, and continuously at all times between the said twenty-fifth day of August in the year last aforesaid and the day of the presenting of this indictment, unlawfully, corruptly, wickedly, and maliciously did conspire, combine, confederate, and agree together and with divers other persons to the grand jurors unknown, indirectly to obtain from the said United States for a certain corporation, to wit, The New Mexico Lumber Company, a large quantity of land, to wit, eleven hundred and seventeen acres of timber lands, in excess of the quantity of such lands which the said corporation
68 could lawfully obtain directly from the United States." That these lands were subject to entry at the Durango land office under the laws pertaining to the sale of timber lands and under the regulations made in pursuance to law by the Commissioner of the General Land Office. It is then charged that a description of the lands is set forth in that part of the indictment which subsequently charges the commission of overt acts in procuring the execution and verification of certain documents each entitled "Testimony of claimant." It is then charged that the lands were to be obtained as aforesaid from the United States for said corporation in the following manner, "by the said defendants soliciting and procuring the persons aforesaid (presumably those theretofore charged as unknown to the grand jurors) for hire and under agreements with them separately to that end, to pay to the receiver of the said land office, with moneys to be furnished to them by the said corporation, the price fixed by law therefor, make entries as individual entrymen at the land office aforesaid with the said receiver of tracts of such lands in quantities respectively not exceeding the quantities allowed by the said laws and regulations, secure patents from the said United States for the said lands to themselves as such entrymen, and make conveyances of the title to the said lands to one William Barth, an agent and trustee for the said corporation, and by the said defendants requiring the said William Barth to convey such title to the said corporation."

After setting forth eight overt acts done in furtherance of said conspiracy, the indictment then concludes: "And so the grand
69 jurors aforesaid, upon their oath aforesaid, do say that (the defendants, naming them) on the said twenty-fifth day of August in the year eighteen hundred and ninety-nine, and from thence hitherto and at the several times of the committing of the said several overt acts in this indictment charged (the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement during all the time from the said day when the same was originally entered into, to wit, the said twenty-fifth day of August in the year eighteen hundred and ninety-nine, to the date of the presenting of this indictment being still continuing and in existence), in manner and form in this indictment aforesaid, unlawfully, corruptly, wickedly, and maliciously did conspire, etc.," indirectly, deceitfully, and fraudulently to obtain from the United States, for the said corporation, certain of the public lands and property of the United States in quantity greatly in excess of the quantity which the said corporation could lawfully obtain directly, and in that manner defraud the United States of its valuable property in such lands, and of its governmental functions in disposing of the same.

The indictment then charges overt acts in furtherance of said conspiracy as follows:

1. That the defendant Freeman on the 25th day of August, 1899, unlawfully did, by solicitation and promise of reward to her in some small sum of money the amount whereof is to the grand jurors unknown, induce and procure one Jennie Culbertson to execute
70 and verify by her oath before the said register a certain document in the form prescribed by law and entitled "Testimony of claimant," for presentation by the said Jennie Culbertson to the said register, and through the said register to the Commissioner and the said Secretary, in connection with the entry of the said Jennie Culbertson of the timber lands described, containing one hundred and sixty acres.

The second and third overt acts as charged are identical with the first in time, character of affidavit, and amount of lands, and differ only as to name of entryman.

The fourth, fifth, sixth, and seventh overt acts charged are identical with the first except that they all charge the overt acts therein specified to have been done on October 11, 1899; they differ, however, as to the name of entrymen.

The eighth overt act as charged is to the effect that the defendants McPhee and McGinnity, on May 15th, 1906, unlawfully did request and require said William Barth to sign and execute a certain quitclaim deed conveying the title to all the lands described in the overt acts to the corporation as grantee. The indictment then sets forth the deed in hec verba, the closing paragraph of which, in the testimonial clause thereof, is as follows, "This deed is given as correction for deed made June 1, 1900."

71 The lands described in this indictment were, it is claimed, acquired from the Government under act June 3, 1878, as amended August 4, 1892, and known as the Timber and Stone Lands Act. This act in its first section specifies the qualifications of purchasers or entrymen thereunder, and limits the amount of land which each may acquire to one hundred and sixty acres. The second section provides that the applicant, at the time of his application, shall file a written statement in duplicate under oath with the register, describing the land which he desires to purchase and its quality, that he has made no other application under this act, and that he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit, and that he has not, directly or indirectly, made any agreement or contract in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the Government of the United States should inure, in whole or in part, to the benefit of any person except himself. It then provides that if he swears falsely he shall be guilty of perjury and forfeit the money which he paid for said lands, and all right and title to the same, and any grant or conveyance which he may have made, except in the hands of bona fide purchasers, shall be null and void. The third section provides that on the filing
72 of the applicant's statement the register shall post a notice of the application in his office for a period of sixty days, and that the applicant shall publish the same notice in a newspaper nearest the location of the premises for a like period of time, and after the expiration of said sixty days, if no adverse claim shall have been filed, the party desiring to purchase shall furnish to the register of the land office satisfactory evidence, first, that said notice of the application prepared by the register as aforesaid was duly published in a newspaper as herein required; secondly, that the land is of the character contemplated in this act, unoccupied and without improvements, etc., etc., and upon payment to the proper officer of the purchase money of said land together with the fees of the register and receiver, etc., etc., the applicant may be permitted to enter said land, and a patent shall issue thereon. It further provides that any person having a valid claim to any portion of the land may object in writing to the issuance of the patent, and evidence shall be taken thereon as to the merits of said objection.

By referring back to the charging part of the indictment it will be observed that it is not charged that the defendants conspired to procure others to make applications to purchase said lands. The
73 charge is that the conspiracy consisted in hiring others and under agreements with them separately to that end to pay to the receiver of the said land office with money to be furnished them by the said corporation the price fixed by law therefor, make entries as individual entrymen at the land office aforesaid, etc. From this it is evident that the certain documents described as "Testimony of claimant" in the several overt acts had reference to an affidavit re-

quired by the land office officials when the claimant appeared at the office after the sixty days publication, as provided in section 3 of the act. Indeed, this was not denied by counsel for the Government on argument.

Defendants demur and move to quash.

I.

The indictment in its charge does not embody the use of criminal means to accomplish the end. So the inquiry is, Do the facts charged constitute a defrauding of the United States within the meaning of the second clause of sec. 5440?

The offense here considered and found in that section, stated shortly but fully, is a conspiracy to defraud. The words following "defraud" are only for the purpose of bringing the offense within Federal jurisdiction. That section does not define the offense. It is more in the nature of a taking over and an application to Federal criminal jurisprudence of the well-defined common law offense. We do not find the offense there spelled out, but it is just as clear
74 and apparent as if the words had done so. In Pettibone v. United States, 148 U. S., 197, the Chief Justice tells us, "The courts of the United States * * * resort to the common law for the definition of terms by which offenses are designated." And proceeding further, the Chief Justice there defines the offense named in this section as follows:

"A conspiracy is sufficiently described as a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means."

So we bear in mind this definition.

In a consideration of this indictment it is also equally necessary to bear in mind the timber and stone act (act June 3, 1878, and amendment August 4, 1892).

We find that the indictment sets in where the second section of the timber and stone act leaves off. It charges that the purpose of the conspiracy was to "hire and under agreements" with entrymen have them pay for the lands with moneys of the corporation and have them make entries. It does not charge the date on which such hiring and agreements to make entries were to be made, nor that the entrymen were hired to make applications, nor that said hiring and agreements were prior to any application. The indictment
75 appears to attempt to challenge some acts done by the entrymen under the provisions of section 3 of said act, to wit: The hiring of and agreement with entrymen (who had made application before that under section 2 of the act) to make entries and pay for the lands with moneys furnished by the corporation.

A violation of section 2 of the act is made a crime and inflicts a forfeiture. It is doubly penal, and if circumvented would amply fill

the demands of the second clause of sec. 5440. And a violation of section 3 of the act, as to its material requirements in the giving of "satisfactory evidence," is likewise conceded to constitute a crime, and such conduct, if induced by others, would also constitute a fraud against the Government. In the light of such denouncements in sections 2 and 3, and in the absence of any further prohibition, how can we say that it is a criminal fraud for an intending qualified entryman after his application to contract to sell in futuro the lands he has made application for with an honest purpose to acquire, and to obtain from his purchaser expectant the funds to make payment?

Such a contract has been held valid even before the vendor has entered or made application to purchase, he being in posses-
76 sion at the time. Hussey v. Smith, 99 U. S., 20; Lamb v. Davenport, 18 Wall., 307; Gaines v. Molen, 30 Fed., 27.)

In Snow v. Flannery, 10 Ia., 318, it appeared that plaintiff settled upon one half of a quarter section, defendant upon the other half, each claiming the quarter. They finally agreed that plaintiff would withdraw his preemption and permit the defendant to prove up on the entire quarter, and that thereafter the defendant should deed to the plaintiff the half that plaintiff claimed, at the Government price of $1.25 per acre. Plaintiff sued the defendant for specific performance, and one of the defenses was that the contract was in violation of the act of Congress of September 4, 1841, which declared that "all assignments and transfers of the right hereby secured prior to the issuing of the patent shall be null and void." The court said:

"A contract made before the issuing of the patent to convey after, does not violate the letter or spirit of the law so as to invalidate the contract between the parties. * * * Plaintiff did not violate any law by his contract with the defendant."

In McKennon v. Winn, 33 Pac., 582 (Okla.), the court had under consideration the validity of a contract made to execute a future conveyance to certain town lots, title to which was at the time of execution of the contract in the United States. It was said: "It
77 is contended that the contract is one for the sale of an interest in public lands made before the title had passed from the United States, and hence is void as against public policy." The court then refers to Lamb v. Davenport, 18 Wall., and Hussey v. Smith, 99 U. S., and continues: "There was no positive law at the time this contract was entered into forbidding the sale of town lots by settlers, and the contract was binding in law."

In Lipscomb v. Nichols, 6 Colo., 290, it appears that a contract was made providing that one of the parties should enter and acquire title to Government coal lands and on the consideration named in said contract convey an interest in said lands after title had been acquired by the other party to the contract. Title was acquired from the Government by the party who agreed to obtain it, and thereafter a bill filed by the other party for specific performance. To this bill Nichols, who had obtained title from the Government, demurred; the court said:

"As to the other point made in the demurrer, that the contract was in violation of the act of Congress providing for the entry of coal lands, we fail to find it supported by the acts referred to. Had this agreement been made respecting the entry of agricultural lands this point in the demurrer would not have been without force; but the act relating to the entry and purchase of coal lands on the public domain contained in the chapter of the Revised Statutes of
78 the United States concerning mines and mineral lands, is wholly unlike the laws governing the entry and acquisition of title by occupants of agricultural lands. This will be seen by a reference to the act itself, without our quoting it here or discussing its provisions."

In the act of Congress considered in the last case there was no prohibition against the making of the contract.

Of course, in the above cases, a possessory right in the vendors was recognized; but they are not cited here for the purpose of establishing in the defendants or the corporation any rights against the Government under the facts charged. They are only invoked to show how such dealings on the part of entrymen with others are characterized, whether criminal or even unlawful. They are held to be enforceable contracts between the parties. How, then, can they be made the basis of a criminal conspiracy? Such acts do not involve moral turpitude, such base, corrupt, and malevolent purpose as will constitute a criminal defrauding; such baseness, vileness, and depravity as exists in Curley v. United States, 130 Fed., 1, and United States v. Stone, 135 Fed., 393.

In Spring Co. v. Knowlton, 103 U. S., 49, 57, it is said:

"It is to be observed that the making of the illegal contract was malum prohibitum, and not malum in se. There is no moral turpitude in such a contract, nor is it of itself fraudulent, however much it may afford facilities for fraud."

79 In United States v. Thompson, 29 Fed., 86, Judge Deady said:

"It (sec. 5440) must therefore be construed to include every conceivable case of conspiracy to defraud the United States; that is, to deprive or divest it of any property, money, or other thing otherwise than as the law requires or allows."

But it is said the indictment charges a violation of section 1 of the act in the acquisition of more land by the corporation than there limited. When it comes to that the indictment does not charge that the several entrymen were disqualified as such, nor that when they made application they had outstanding contracts to sell, or were then acting under agreements or hire for said defendants or said corporation. A compliance with the timber and stone act, by the entrymen, in both its spirit and letter, prior to and at time of application is not challenged by the indictment. Can the court fix a time other than that found in the enactment, prior to which the entryman may not contract, as charged a violation of which shall be made the basis of a crime? I think not. The views of the Supreme Court in Adams

v. Church, 193 U. S., 510, are here most pertinent. That was an entry under the timber culture act, which required an affidavit of the applicant that the entry is made for the cultivation of timber
80 for the exclusive use and benefit of the applicant; that the application is made in good faith, and not for the purpose of speculation, or directly or indirectly for the use or benefit of any other person or persons whomsoever; that affiant intends to hold and cultivate the land and to comply with the provisions of the act. The act further provides that eight years must elapse from date of entry before final certificate or patent issues, and the applicant is further required before patent to prove by two credible witnesses that he has planted and for eight years cultivated and protected the required quantity and character of trees, and that a certain number of trees per acre shall then be growing upon the land. The rules and regulations of the land office (but not the statute) required a like affidavit on final proof to the one required by the statute on application. Mr. Justice Day, delivering the unanimous opinion of the court in that case, said:

"It is the contention of the plaintiff in error that these provisions demonstrate the policy of the law to grant the land in question to the person filing the entry, his heirs and legal representatives, and none other; and that to make the sale of an interest in the lands to another as a partner, as is found to have been done in this case, is void as against public policy. * * * There is no requirement in the latter act that the entryman shall make oath that he has not alienated any interest in the land. The policy of the Government to require such affidavit when it intends to make it a condition precedent to granting a title was indicated in the homestead act, and could readily
81 have been pursued by a similar provision in the timber culture act if it was intended to extend the principle to that statute. The final proof under the latter act has in view sworn testimony that the number of trees required has been planted, and the prairies theretofore barren of timber have been supplied with trees to the extent required by the law before the title shall pass from the Government. The policy of the homestead act, no less than the specific statement in the final oath, looks to a holding for a term of years by an actual settler with a view to acquiring a home for himself. In encouragement of such settlers, and none others, homesteads have been freely granted by the Government.

"This conclusion is in conformity with the decisions of the Land Department in Sims v. Bruce, 4 L. D., 309, and United States v. Read, 5 L. D., 313. In these cases the right of the timber culture entryman to dispose of his holding, acquired by him in good faith, before the final certificate, is fully recognized. It is argued that, conceding these decisions to hold that such entryman can sell his claim after entry and before final proof, it does not follow that he can sell it and agree to prove up the entry claim and obtain a patent with a promise to convey it to another, without violating the policy of the law. But

as the law does not require affidavit before final certificate that no interest in the land has been sold, we perceive no reason why such contract, as was found to exist by the Supreme Court of Oregon, would vitiate the agreement to convey after the certificate is granted and the patent issued. If the entryman has complied with the statute and made the entry in good faith, in accordance with the terms of the law and the oath required of him upon making such entry, and has done nothing inconsistent with the terms of the law, we find nothing in the fact that, during his term of occupancy, he has agreed to convey an interest to be conveyed after patent issued, which will defeat his claim and forfeit the right acquired by planting the
82 trees and complying with the terms of the law. Had Congress intended such result to follow from the alienation of an interest after entry in good faith it would have so declared in the law. Myers v. Croft, 13 Wall., 291.

"To sustain the contentions of the plaintiff in error would be to incorporate by judicial decision a prohibition against the alienation of an interest in the lands, not found in the statute or required by the policy of the law upon the subject."

The same conclusion in principle seems to have been reached by that court in United States v. Budd, 144 U. S., 154, a suit in equity involving the act now under consideration.

The acts charged against the defendants are not prohibited in the timber and stone act, and we cannot by construction read into that act a prohibition against them, and in such manner by construction hold the acts charged to be in violation of said statute, and therefore illegal or unlawful for the purpose of constituting the fraud denounced by sec. 5440.

In United States v. Clayton, 2 Dillon, 219 (Fed. Cases No. 14814), Judge Dillon said:

"The principle that the legislative intent is to be found, if possible, in the enactment itself, and that the statutes are not to be extended by consruction to cases not fairly and clearly embraced in their terms, is one of great importance to the citizen. The courts have no power to create offenses, but if by a latitudinarian construction they construe cases not provided for to be within legislative enactments, it is manifest that the safety and liberty of the citizen are put in peril, and that the legislative domain has been invaded. Of
83 course, an enactment is not to be frittered away by forced constructions, by metaphysical niceties, or mere verbal and sharp criticism; nevertheless the doctrine is fundamental in English and American law, that there can be no constructive offenses; that before a man can be punished his case must be plainly within the statute, and if there be any fair doubt whether the statute embraces it, that doubt is to be resolved in favor of the accused. These principles of law admit of no dispute, and have been often declared by the highest courts, and by no tribunal more clearly than the Supreme Court of the United States. U. S. v. Morris, 14 Pet. (39 U. S.), 464; U. S.

v. Wiltberger, 5 Wheat. (18 U. S.), 76; U. S. v. Sheldon, 2 Wheat. (15 U. S.), 119. And see, also, Ferret v. Atwill (Case No. 4747); Sedg. St. & Const. Law, 324, 326, 334; 1 Bish. Cr. Law, 134, 145."

In United States v. Wiltberger, 5 Wheaton, 76, 95–6, it was said by Chief Justice Marshall:

"The rule that penal laws are to be construed strictly is perhaps not much less old that construction itself. * * * To determine that a case is within the intention of the statute its language must authorize us to say so; it would be dangerous indeed to carry the principle, that a case which is within the reason or mischief of the statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated."

In Smith v. Townsend, 148 U. S., 490, 497, Mr. Justice Brewer, speaking for the court, said:

"Statutes against frauds are to be liberally and beneficially expounded. This may seem a contradiction to the last rule, most
84 statutes against frauds being in their consequences penal. But this difference is here to be taken: Where the statute acts upon the offender, and inflicts a penalty, as the pillory, or a fine, it is then to be taken strictly; but when the statute acts upon the offense, by setting aside the fraudulent transaction, here it is to be construed liberally. 1 Bl. Com., 88."

In France v. United States, 164 U. S., 676, it is said:

"The statute does not cover the transaction and however reprehensible the acts of the plaintiffs in error may be thought to be, we can not sustain a conviction on that ground. Although the objection is a narrow one, yet the statute being highly penal, rendering its violator liable to fine and imprisonment, we are compelled to construe it strictly. * * * If it be urged that the act of these plaintiffs in error is within the reason of the statute, the answer must be that it is so far outside of its language that to include it within the statute would be to legislate and not to construe legislation."

To the same effect see Francis v. United States, 188 U. S., 375, and United States v. Benecke, 98 U. S., 447. Taylor v. United States and United States v. Macdonald, both opinions of the Supreme Court rendered November 18th, 1907.

Todd v. United States, 158 U. S., 278.

This rule is quite too familiar to demand further extended notice.

From these authorities I understand the settled rule to be that when it is sought to charge that designated acts constitute a crime
85 under a statute it is not sufficient that such acts be violative of the spirit and policy of the statute or of the words of the statute, but that they must be violative both of the words and of the spirit and policy of the statute. That is, the acts must fall both within a reasonable meaning of its terms and also within the spirit and scope of the enactment. Or otherwise stated, the acts charged must come not only within the mischief, but fairly within the words.

In the light of this time-honored, unbroken, and invariable rule, sustained constantly by all authorities, both ancient and modern, it seems idle to talk about following here the construction placed on the timber and stone act in civil proceedings before the Department as shown in the Land Office decisions. We all agree that in the determination of civil rights, with which the Department only can deal, its construction would be most helpful and valuable to the courts, and the instance would be rare indeed in which the courts would find it necessary to depart from the construction there made. As evidence of this it is only necessary to cite Hawley v. Diller, 178 U. S. In the determination of civil rights the words of a statute may be only a dry lifeless form, to be disregarded, if its purpose, scope and policy, clearly ascertained within its four corners,
86 convince to the contrary; but here, as above shown, we must keep within both the words and scope and policy of the statute.

But, it is urged, that the criminality of the acts charged here is foreclosed against the defendants by Hyde v. Shine, 199 U. S., 62. I think not; for it there appears that both the means to be used to accomplish the end and the end as well were criminal. It is expressly stated that the patent from the State to fictitious persons did not convey title to the State's lands; hence the carrying out of the conspiracy by obtaining from the Government its lands in exchange for lands which had been patented to fictitious persons would have been an obtaining of the lands of the Government without any consideration therefor.

From the foregoing I conclude:

First, that the agreements between the entrymen and defendants, as charged in the indictment, were neither void nor voidable but were enforcable contracts between the parties.

Second, that the acts charged are neither prohibited by statute and unlawful, nor mala in se, nor do they involve moral turpitude; hence whether we consider them either as means to accomplish an end, or as the end to be accomplished, they do not constitute a crime.

The indictment, therefore, does not charge an offense.

87 II.

The demurrer and motion also challenge the indictment as being duplicitous. It charges that the defendants "on the twenty-fifth day of August, in the year eighteen hundred and ninety-nine, and at the several times of the committing of the several overt acts hereafter in this indictment mentioned, and continuously at all times between the said twenty-fifth day of August in the year last aforesaid and the day of the presenting of this indictment, unlawfully, etc., did conspire, etc." The formation of the conspiracy, and not the overt acts, constitute the offense.

United States v. Britton, 108 U. S., 199.
Dealy v. United States, 152 U. S., 546.
Pettibone v. United States, 148 U. S., 196.
Ware v. United States, 154 Fed., 557.

Looking now to the overt acts, as we are told we may do in Stearns v. United States, 152 Fed., 900, for the purpose of ascertaining the sense in which terms are used in charging the conspiracy, we find in said overt acts three several dates given. It would therefore appear that this objection is well taken.

But it is insisted that the closing part of the indictment, found after the overt acts are set out, shows clearly that but one con-
88 spiracy is charged, and that that was a continuing conspiracy from August 25th, 1899, to the date of the presenting of the indictment. And this leads us to another objection raised.

III.

Assuming that the indictment does not charge several conspiracies, as above indicated, but that it was one conspiracy continuous from its formation on August 25th, 1899, to the presenting of the indictment, we come to consider the plea of the statute of limitations. The first overt act, in furtherance of the conspiracy, is charged as of date August 25th, 1899, and it is insisted by the defendants that if the indictment charges but the one conspiracy, that on the commission of that overt act prosecution could have then been had, and that therefore the statute of limitations began to run as of that date. Against this it is answered that under the doctrine in the Ware case, supra, every overt act, with "conscious participation" by the defendants in the unlawful combination, works a renewal of the conspiracy. This may be conceded to be the clear holding in that case, but it is evident that that conclusion was there reached on a consideration of the rules applicable to evidence and the particular proof then in hand, which is a very different thing from the rules applicable to pleading
89 in charging a criminal offense. In that case the indictment charged the formation of a conspiracy within the statute, and if the proof in such a case sustains the charge it would be no defense for the defendant to show that a like conspiracy had been theretofore formed and overt acts done thereunder prior to the bar. Taking, therefore, the closing part of the indictment as a part of the charge it appears that the conspiracy charged against the defendants and all of the overt acts charged thereunder save the last one were at a time far more than three years before the filing of the indictments. The reasoning of Judge Deady in United States v. Owen, 32 Fed., 534, impresses me as sound. He there said:

"The general rule is that the statute begins to run from the commission or consummation of the crime. Wharton Crim. Pl., sec. 321. When was this crime committed? The conspiracy was formed on July 1st, 1881, and the first act done by any of the conspirators in pursuance thereof was the making of the alleged false affidavits by Ankenny on December 26, 1881, in relation to the character of the land mentioned therein. The crime was then consummated. The two elements of which it is composed—the conspiracy and the act—were accomplished, and the crime committed. On December 27th,

1881, more than five years prior to the institution of this prosecution, an indictment might have been found against the defendants for this crime. This being so, the limitation on the right to institution and prosecution therefor began to run at the same time, and became a bar thereto on that day, in 1884."

90 I think this view is also sustained in United States v. Irvine, 98 U. S., 450.

But further, the last overt act is of date May 15th, 1906, and it is to the effect that the defendants McPhee and McGinnity did unlawfully request and require William Barth (who was the trustee to take title as charged in the indictment) to execute a certain quitclaim deed conveying title to the lands described in the other overt acts to the corporation named in the charging part, as grantee. Now, the language of sec. 5440 is "and one or more of such parties do any act to effect the object of the conspiracy." It is contended for the Government, and authorities have been cited to that effect, that if the overt act is charged to have been to effect the object of the conspiracy, it becomes a question for the jury and not for the court to say whether such overt act was done to effect the unlawful purpose. But in those cases it does not affirmatively appear from the charge that the overt act could not have had such an effect, while here I think it does appear that this overt act could not by any possibility have been done to effect the object of the conspiracy. Bearing in mind the offense charged, to wit, a conspiracy to defraud the United States, is it not apparent that the mere execution of the deed by Barth to

91 the lands could have no such effect? I think it is. The evident purpose of the pleader in inserting this overt act in the indictment is an attempt to toll the limitation of the statute.

Therefore, if we take the first view the charge is duplicitous, and if the second, prosecution of the offense is barred. The dilemma renders the indictment bad.

The motion and demurrer are sustained.

ROBERT E. LEWIS,
District Judge.

Dec. 24/07.

92 To which action, decision, and order of the court sustaining the said demurrers and special defences, for the reasons and upon the grounds aforesaid, the United States, by its counsel, then and there duly excepted.

And thereafter, on the 6th day of January, 1908, the said court made and entered its final order and judgment in this cause, pursuant to the said decision, and based upon the reasons and grounds in the said opinion set forth, sustaining the said demurrers and special defences, quashing the said indictment, and adjudging that the defendants of and from the premises in the indictment specified be discharged and go hence without day.

To which order and judgment of the court, and to each and every part thereof and particularly to those parts thereof, upon the reasons and grounds aforesaid, sustaining the said demurrers and special

defences and quashing the said indictment, and adjudging that the defendants of and from the premises in the indictment specified be discharged and go hence without day, the United States, by its counsel, then and there duly excepted.

And forasmuch as the foregoing matters do not appear of record, the plaintiff tenders this its bill of exceptions, and prays that the same may be signed and duly authenticated and made a part of the record herein, which is accordingly done this 21st day of January, 1908.

ROBT. E. LEWIS,
District Judge.

Service of the foregoing bill of exceptions was made upon us this 18th day of January, 1908.

CLYDE C. DAWSON,
CHARLES J. HUGHES, JR.,
Attorneys for the defendants in the above entitled cause.

93 (Endorsed:) No. 2028. R. S. U. S., sec. 5440. In the U. S. District Court. United States of America, plaintiff, v. Edgar M. Biggs et al., defendants. Bill of exceptions. Filed Jan. 21, 1908. Charles W. Bishop, clerk.

94 UNITED STATES OF AMERICA,
District of Colorado, ss:

In the District Court of the United States within and for the District of Colorado.

THE UNITED STATES OF AMERICA, PLAINTIFF,
v.
EDGAR M. BIGGS, CHARLES H. FREEMAN, Charles D. McPhee, and John J. McGinnity, defendants. } No. 2028.

Petition for writ of error.

And comes now the United States, plaintiff herein, and says that on the 24th day of December, 1907, this court made its decision sustaining the demurrers and special pleas of the defendants and setting aside the indictment in this cause, and that thereafter, and on the 6th day of January, 1908, this court, pursuant to that decision, entered judgment herein in favor of the defendants and against this plaintiff, in which judgment and decision certain errors were committed to the prejudice of this plaintiff, and of such a character as to entitle this plaintiff, under the law, to review the said judgment and decision in the Supreme Court of the United States by writ of error, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, this plaintiff prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of the errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the said Supreme Court.

95 RALPH HARTZELL,
Ass't. & Acting United States Attorney
for the District of Colorado.
ERNEST KNAEBEL,
Special Assistant to the Attorney-General,
Attorneys for Plaintiff.

UNITED STATES OF AMERICA,
District of Colorado, ss:

Upon reading and filing the foregoing petition and the assignment of errors therein referred to, it is ordered that the petition be, and the same hereby is, allowed and that a writ of error as therein prayed be issued by the clerk of the Circuit Court for this district, under the seal of such Circuit Court, pursuant to section 1004 of the Revised Statutes.

Dated, Denver, Colorado, January 22nd, 1908.

ROBT. E. LEWIS,
District Judge.

(Endorsed:) No. 2028. United States District Court, District of Colorado. The United States of America, plaintiff, v. Edgar M. Biggs et al., defendants. Petition for writ of error, and order allowing writ. Filed January 22, 1908. Charles W. Bishop, clerk.

96 UNITED STATES OF AMERICA,
District of Colorado, ss.

In the District Court of the United States within and for the District of Colorado.

THE UNITED STATES OF AMERICA, PLAINTIFF. *vs.* EDGAR M. BIGGS, CHARLES H. FREEMAN, Charles D. McPhee, and John J. McGinnity, defendants.	No. 2028.

Assignment of errors.

Comes now the United States of America, plaintiff in the above entitled cause, and files this assignment of errors upon which it will rely in the prosecution of the writ of error to be sued out by it for review by the Supreme Court of the judgment heretofore entered by the District Court for the District of Colorado in the above entitled cause, to wit:

First. The District Court for the district of Colorado erred in quashing the indictment in the above entitled cause.

Second. The said District Court erred in sustaining the demurrer of the defendants, Edgar M. Biggs and Charles H. Freeman, to the indictment in said cause.

Third. The said District Court erred in sustaining the demurrer of the defendants, Charles D. McPhee and John J. McGinnity, in said cause.

Fourth. The said District Court erred in overruling the demurrer of the United States, interposed ore tenus at the time of argument, and questioning the legal sufficiency as to substance of the
97 special plea of the defendants, Biggs and Freeman, interposed by them in and with their demurrer to the indictment, and setting up the statute of limitations as a bar to the prosecution, and in sustaining the said special plea in bar, neither the said defendant Freeman nor the said defendant Biggs having ever been put in jeopardy in the cause.

Fifth. The said District Court erred in overruling the demurrer of the United States, interposed ore tenus at the time of argument, and questioning the legal sufficiency of the special plea of the defendants, McPhee and McGinnity, interposed by them in and with their demurrer to the indictment, and setting up the statute of limitations as a bar to the prosecution, and in sustaining the said special plea in bar, neither the said defendant McPhee nor the said defendant McGinnity having ever been put in jeopardy in the cause.

Sixth. The said District Court erred in construing section 5440 of the Revised Statutes, as amended by the act of May 17, 1879 (21 Stat. L., page 4), in effect so as to limit and restrain the operation of that section (so amended) to conspiracies to commit substantive criminal offenses against the United States and conspiracies to defraud the United States by means necessarily involving the commission of substantive criminal offenses against the United States, and in sustaining the demurrers of the defendants and quashing the indictment upon the basis of such erroneous construction of said statute.

Seventh. The said District Court erred in construing section 5440 of the Revised Statutes (as so amended) as inapplicable to conspiracies such as the conspiracy described in the said indictment,
98 wherein and whereby the conspirators intend and agree to procure indirectly from the United States for a corporation numerous tracts of the public timber lands of the United States, susceptible of entry under the act of June 4, 1878 (20 Stat. L., 91), commonly called the timber and stone act, by inducing and procuring numerous other persons to make entry and purchase of said tracts, severally and respectively, each in his own name and ostensibly for his own use and benefit, but each in fact pursuant to an intention on his part and an antecedent agreement with the conspirators to enter and purchase the land from the United States for the use of such corporation with moneys to be furnished by it, and to deed the land after entry to an agent and trustee for the corporation, all in consideration of some small sum of money to be paid to him (such entry-

man) by the conspirators under such agreement between him and them; and in sustaining the demurrers of the defendants and quashing the indictment upon the basis of such false and erroneous construction of the said statute.

Eighth. The said District Court erred in its construction of Revised Statutes, sec. 5440 (as so amended), in holding that each act done by a party to any conspiracy denounced thereby, and done to effect the object of such conspiracy, completes a separate and distinct offense under the said section in such a sense that an indictment, such as the indictment in this cause, charging such conspiracy, and, in the same count, more than one act so done to effect the object thereof, is vicious for duplicity, and in sustaining the said demurrers and quashing the said indictment partly upon and because of such erroneous construction.

99 Ninth. The said District Court erred in its view and construction of sec. 5440 of the Revised Statutes (as so amended) in this, to wit: In holding, in substance and effect, that the word "conspire" in said section respects only the act of reaching the original unlawful consensus and agreement among and between the conspirators, and not also the subsequent continued adherence to and participation in such consensus and agreement by the conspirators; and in further holding, upon the basis of that erroneous interpretation of the word "conspire," that the offense in the said indictment charged was barred by the statute of limitations (Rev. Stat., sec. 1044), because it appeared upon the face of the said indictment that acts to effect the object of the conspiracy therein described were done by parties to the conspiracy after its original formation, and more than three years prior to the return of the indictment, and because it was further shown by the allegations of fact, contained in the special pleas below mentioned, and admitted to be true by the United States at argument, that the defendants were not fugitives from justice, although the indictment expressly charges and shows that the accused and others were in continuous, unlawful agreement and conspiracy from a time certain preceding the performance of the first act charged as done to effect its object to the time of the return of the indictment, and that an act, done by parties to the conspiracy to effect the object thereof, was done at a time within the three years next preceding the return of the indictment; and the said District Court, acting upon the said erroneous statutory interpretation and construction in this specification mentioned, further erred

100 in overruling the objections, amounting, in legal effect, to demurrers ore tenus, made at argument by the United States to the special pleas of the defendants, setting up the statute of limitations in bar of the prosecution, and by them pleaded in connection with, and as though parts of, their said demurrers, and in thereupon sustaining the said special pleas, quashing the said indictment, and rendering judgment for the defendants, none of the said defendants having ever been put in jeopardy for the said offense charged.

Tenth. The said District Court erred in its conception and construction of section 5440 of the Revised Statutes (as amended) in holding that the last act charged in the indictment as done to effect the object of the said conspiracy could not, in any legal sense, have been an act done to effect such object within the true intent and meaning of the said statute, and in sustaining the aforesaid special pleas of the statute of limitations, and quashing the said indictment and entering judgment for the defendants, partly because of such erroneous construction.

Eleventh. The said District Court erred in rendering judgment for the defendants based upon the erroneous constructions and interpretations of section 5440 of the Revised Statutes (as amended), which are described and indicated in the sixth, seventh, eighth, ninth, and tenth specifications of this assignment of errors.

Twelfth. The said District Court erred in holding that section 5440 of the Revised Statutes (as amended), taken in connection with the said timber and stone act, did not apply to the facts set forth in the indictment, so as to make the defendants liable as for a criminal offense; and in sustaining the said demurrers to the indictment upon that ground.

Thirteenth. The said District Court erred in holding that
101 the facts stated in the indictment did not make a case of conspiracy to defraud the United States within the meaning of section 5440 of the Revised Statutes (as amended), regard being had to the provision of the said timber and stone act which limits the amount of land which an association of persons can purchase thereunder from the Government to 160 acres; and in thereupon sustaining the said demurrers to the indictment.

Fourteenth. The said District Court erred in not holding that the indictment fully and sufficiently charged the defendants with the offense of conspiring to defraud the United States within the meaning of section 5440 of the Revised Statutes of the United States, and in not overruling the said demurrers to the indictment accordingly.

Fifteenth. The said District Court erred in holding that section 5440 of the Revised Statutes (as amended), in connection with the provisions of the said timber and stone act, does not make criminal a conspiracy to obtain from the United States, for a corporation, timber lands in excess of 160 acres by procuring a number of other persons to purchase from the United States separately, and with moneys furnished by the corporation, such quantities of timber lands as they might, respectively, lawfully purchase, and thereupon, in pursuance of an antecedent agreement to that end, convey such lands to the corporation; and in thereupon sustaining the said demurrers to the indictment.

Sixteenth. The said District Court erred in holding that section 5440 of the Revised Statutes (as amended), in connection with the provisions of the said timber and stone act, did not make criminal a conspiracy to obtain from the United States, for a corporation, timber lands in excess of 160 acres by procuring a number of other

persons to purchase from the United States separately, and
102 with moneys furnished by the corporation, such quantities of timber lands as they might, respectively, lawfully purchase, and thereupon, in pursuance of an antecedent agreement to that end, convey such lands to the corporation, even though such persons had already filed their preliminary applications to enter such lands before they were so induced by the defendants to complete their entries; and in thereupon sustaining the said demurrers to the indictment.

Seventeenth. The said District Court erred in not holding that the indictment sufficiently charged a conspiracy upon the part of the defendants to defraud the United States by obtaining, for a corporation named, in an indirect and fraudulent manner, a quantity of timber lands in excess of the quantity which they could have lawfully obtained directly for such corporation; and in thereupon sustaining the said demurrers to the indictment.

Eighteenth. The said District Court erred in holding that, because the charges of overt acts were predicated upon steps taken subsequently to the making of the preliminary applications, the indictment charged a conspiracy to obtain timber lands from the entrymen, after the entrymen had filed their preliminary applications, rather than from the United States, through such entrymen, by procuring them to make and file such preliminary applications amongst other things; and in thereupon sustaining the said demurrers to the indictment.

Nineteenth. The said District Court erred in holding the indictment bad for duplicity in that it charged a conspiracy originating, and overt acts committed, more than three years before the presentation of the indictment, although it also charged that the conspiracy was engaged in continuously from the time when it began down to the time of the presentation of the indictment, and that overt acts were committed within the three years next before the finding of the indictment; and in thereupon sustaining the said demurrers to the indictment upon the ground of duplicity.

103 Twentieth. The said District Court erred in holding that the allegations of the indictment to the effect that the defendants were to procure other persons to make entries of timber lands which were open to entry under the said timber and stone act, and secure patents therefor, did not cover the making by such persons of preliminary applications for such lands required by section 2 of the said act; and in thereupon sustaining the said demurrers to the indictment.

Twenty-first. The said District Court erred in not holding that the indictment sufficiently charged a conspiracy to defraud the United States by obtaining, for a corporation named, in an indirect and fraudulent manner, a quantity of timber lands in excess of the quantity which they could have lawfully obtained directly for such corporation; and this by procuring other persons for hire to do everything necessary to the securing of the title to such lands from the United States, including the executing and filing in the land office not only of the preliminary applications required of such entrymen, but

also the taking of any and all steps necessary to the securing of such title in such entrymen as parts of the conspiracy; and in not thereupon overruling the said demurrers to the indictment.

Twenty-second. The said District Court erred in not holding that the indictment could consistently and properly charge the offense of conspiracy as having been begun more than three years before the finding of the indictment, when it also charged that the conspiracy still existed and overt acts were committed thereunder within the three years next preceding the finding of the indictment, and in not accordingly overruling the opposite contention of the defendants made in and in connection with their special pleas of the statute of limitations embodied in their said demurrers.

104 Twenty-third. The said District Court erred in not holding that the allegations of the indictment which charged that the conspiracy originated more than three years before the presentation of the indictment were mere matters of inducement to the real charge of conspiracy within three years, and that these and the overt acts charged to have been committed more than three years before the presentation of the indictment were not matters tending to vitiate the indictment, and in sustaining the said special defenses of the defendants based upon the statute of limitations, and in setting the indictment aside upon and because of that erroneous holding.

Twenty-fourth. The said District Court erred in holding that the overt acts charged in the indictment could be looked to as furnishing in part a description of the conspiracy itself, and in holding the indictment insufficient and setting the same aside, upon an erroneous construction of the charging part thereof, based upon such reference to the charges of overt acts.

Twenty-fifth. The said District Court erred in sustaining demurrers to the indictment, raising the point that the offense charged in the indictment was barred by the statute of limitations, in connection with averments that the defendants had not been fugitives from jusitce.

Wherefore, the United States of America prays that the judgment of the District Court of the United States for the district of Colorado be reversed, and that the said District Court be directed to reinstate the said indictment and proceed with the trial of the cause.

RALPH HARTZELL,
Assistant and Acting United States Attorney
for the District of Colorado.
ERNEST KNAEBEL,
Special Assistant to the Attorney-Genral.

105 (Endorsed:) No. 2028. In the U. S. District Court. The United States of America, plaintiff, vs. Edgar M. Biggs, Charles H. Freeman, Charles D. McPhee, and John J. McGinnity, defendants. Assignment of errors. Filed Jan. 22, 1908. Charles W. Bishop, clerk. Earl M. Cranston, U. S. attorney for the district of Colo.

Fifty-fifth day, November term, Wednesday, January 22nd, A. D. 1908.

Present: The Honorable Robert E. Lewis, district judge, and other officers as noted on the fifth day of November, A. D. 1907.

THE UNITED STATES OF AMERICA
vs. 2028. Indictment for conspiracy.
EDGAR M. BIGGS ET AL.

Upon reading and filing the foregoing petition and the assignment of errors therein referred to, it is ordered that the petition be, and the same hereby is, allowed, and that a writ of error as therein prayed be issued by the clerk of the Circuit Court for this district, under the seal of such Circuit Court, pursuant to section 1004 of the Revised Statutes.

106 UNITED STATES OF AMERICA,
District of Colorado, ss:

In the District Court of the United States for the District of Colorado.

UNITED STATES
versus
EDGAR M. BIGGS ET AL. } No. 2028.

The clerk will issue a complete transcript of the record in the above-entitled cause, said transcript to contain indictment, all demurrers, motions and affidavits, and all orders of court, together with the opinion of the court.

EARL M. CRANSTON,
Attorney for U. S.

To CHARLES W. BISHOP, *Clerk.*
Denver, Colorado, Jan. 4, 1908.
(Endorsed:) No. 2028. United States District Court, for the District of Colorado. U. S. versus Edgar M. Biggs, et al. Praecipe for transcript of record. Filed Jan. 4, 1908. Charles W. Bishop, clerk. Earl M. Cranston, attorney for U. S.

107 UNITED STATES OF AMERICA, *ss.:*

The President of the United States, to the honorable the judge of the District Court of the United States for the district of Colorado, greeting:

Because in the record, decision, and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, between the United States of America, plaintiff, and Edgar M. Biggs, Charles H. Freeman, Charles D. McPhee, and John J. McGinnity, defendants, a manifest error hath happened, to the great damage of the said United States of America, as by its com-

plaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 22nd day of January, in the year of our Lord one thousand nine hundred and eight.

CHARLES W. BISHOP,
Clerk of the Circuit Court of the United States for the District of Colorado.

Allowed by—

ROBT. E. LEWIS.
Judge of the District Court of the United States for the District of Colorado.

107½ THE UNITED STATES OF AMERICA,
District of Colorado, ss:

In obedience to the command of the within writ, I herewith transmit to the honorable, the Supreme Court of the United States, a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said United States District Court, for the district of Colorado, at Denver, in said district, this third day of February, A. D. 1908.

[SEAL.] CHARLES W. BISHOP, *Clerk.*

(Indorsed:) No. 2028. U. S. District Court, district of Colorado. The United States of America versus Edgar M. Biggs, Charles H. Freeman, Charles D. McPhee, and John J. McGinnity. Writ of error to U. S. District Court, district of Colorado. Filed in the District Court of the United States for the district of Colorado, January 22, 1908. Charles W. Bishop, clerk.

108 UNITED STATES OF AMERICA, *ss:*

To Edgar M. Biggs, Charles H. Freeman, Charles D. McPhee, and John J. McGinnity, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the District Court of the United States for the district of Colorado, sitting at Denver, wherein the United States of America is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment and decision rendered

against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Robert E. Lewis, judge of the District Court of the United States for the district of Colorado, this 22nd day of January in the year of our Lord one thousand nine hundred and eight.

ROBT. E. LEWIS,
Judge of the District Court of the United States for the district of Colorado.

108½ UNITED STATES OF AMERICA,
District of Colorado, ss:

I hereby certify that I received the within citation on January 27th, 1908, and served the same as to the defendants Edgar M. Biggs, Charles H. Freeman, Charles D. McPhee, and John J. McGinnity by delivering to and leaving with Charles J. Hughes, jr., their attorney of record, a true copy of the within writ, on January 27th, 1908, at Denver, Colorado.

D. C. BAILEY,
U. S. Marshal.
E. G. JEFFERDS,
Deputy.

Fees and expenses, 4 services $8.00.

(Indorsed:) 2028. U. S. District Court, district of Colorado, The United States of America vs. Edgar M. Biggs, et al. Citation. Filed Jan. 29, 1908. Charles W. Bishop, clerk.

109 UNITED STATES OF AMERICA,
District of Colorado, ss:

I, Charles W. Bishop, clerk of the District Court of the United States for the district of Colorado, do hereby certify the above and foregoing pages numbered from one (1) to one hundred six (106), both inclusive, to be a true, perfect, and complete transcript and copy of the pleadings and other matters set forth in the praecipe filed herein, together with a true copy of such praecipe, and bill of exceptions, petition for writ of error, and assignments of error, and judgment and all other matters (exclusive of bench warrants, recognizances, and briefs) heretofore filed or entered of record in such court, and in a certain case lately in said court pending wherein the United States of America was plaintiff, and Edgar M. Biggs, Charles H. Freeman, Charles D. McPhee, and John J. McGinnity were defendants, as fully and completely as the same still remain on file and of record in my office at Denver.

And I further certify that I have annexed to and transmit herewith a copy of all opinions heretofore handed down and filed in said case.

In testimony to the above, I do hereunto sign my name and affix the seal of said court at the city and county of Denver in said district, this third day of February, A. D. 1908.

[SEAL.] CHARLES W. BISHOP, *Clerk.*

* * * * * * *

134 UNITED STATES OF AMERICA,
District of Colorado, ss:

I, Charles W. Bishop, clerk of the District Court of the United States for the district of Colorado, do hereby certify the above and foregoing pages, numbered from one hundred ten (110) to one thirty-four (134), to be a true, perfect, and complete transcript and copy of all opinions heretofore handed down and filed in said court and in a certain case lately in said court pending wherein the United States of America was plaintiff and Edgar M. Biggs, Charles H.
135 Freeman, Charles D. McPhee, and John J. McGinnity were defendants, as fully and completely as the same still remains on file in my office at Denver.

In testimony to the above, I do hereunto sign my name and affix the seal of said court at the city and county of Denver in said district, this the third day of February, A. D. 1908.

[SEAL.] CHARLES W. BISHOP, *Clerk.*

136 In the Supreme Court of the United States, October term, 1907.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
EDGAR M. BIGGS ET AL. } No. 628.

Stipulation.

It is hereby stipulated by counsel for the parties to the above-entitled cause that in the printing of the transcript of the record herein the clerk of the Supreme Court shall omit pages 110 to 135 inclusive, being a repetition of the opinion of the court found elsewhere in the transcript of the record, to wit, at pages 67 to 91, inclusive.

H. M. HOYT,
Solicitor-General.
CLYDE C. DAWSON,
Counsel for defendants in error.

February, 1908.

137 (Indorsed:) File No. 21031. Supreme Court U. S., October term, 1907. Term No. 628. The United States, p. e., vs. Edgar M. Biggs et al. Stipulation to omit part of record in printing. Filed Feb. 29, 1908.

(Indorsement on cover:) File No. 21031. Colorado D. C., U. S. Term No. 628. The United States, plaintiff in error, vs. Edgar M. Biggs, Charles H. Freeman, Charles D. McPhee, and John J. McGinnity. Filed February 19th, 1908. File No. 21031.

O

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 290.

THE UNITED STATES, PLAINTIFF IN ERROR,

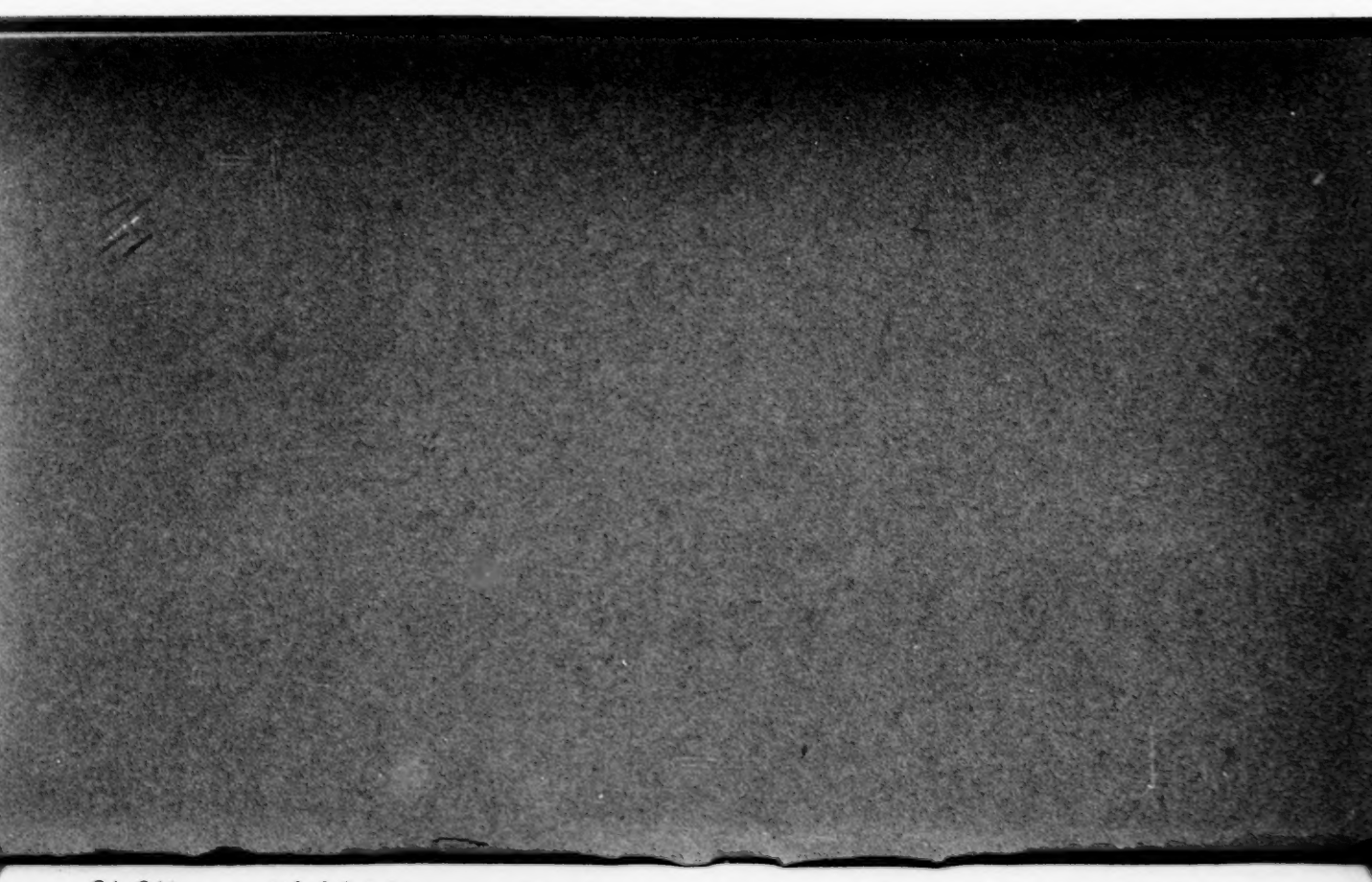
vs.

ALEXANDER T. SULLENBERGER, JAMES S. HATCHER, ELLIS M. HAMPTON, ET AL.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

FILED FEBRUARY 19, 1904.

(21062.)



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 629.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

ALEXANDER T. SULLENBERGER, JAMES S. HATCHER, ELLIS M. HAMPTON, ET AL.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

INDEX.

	Original.	Print.
Caption	1	1
Order for bench warrant, etc	1	1
Indictment	2	1
Motion to quash by Eph. K. Caldwell	52	24
Motion to quash by Ellis M. Hampton	69	32
Motion to quash by Eudolphus M. Taylor	86	40
Motion to quash by James S. Hatcher	103	48
Motion to quash by Robert E. Sloan	121	56
Motion to quash by Alexander T. Sullenberger	138	64
Order beginning hearing	155	71
Order concluding hearing	156	72
Order granting leave to amend motions to quash	156	72
Order sustaining motions to quash	157	73
Judgment	158	73
Bill of exceptions	161	75
Opinion	164	76
Opinion in United States *v.* Biggs et al. (Omitted in printing.)		
Judge's certificate to bill of exceptions	202½	82
Acceptance of service of bill of exceptions	202½	83
Petition for writ of error	203	83
Order allowing writ of error	204	84
Assignment of errors	205	84
Order allowing writ of error	214	89

31975—08——1

	Original.	Print.
Præcipe for transcript	215	90
Writ of error	216	90
Return on writ of error	216½	91
Citation and service	217	91
Clerk's certificate	218	92
Opinion. (Omitted in printing.)		
Clerk's certificate	232	92
Stipulation to omit parts of record in printing	234	93

1 Pleas in the District Court of the United States for the District of Colorado, sitting at Denver.

Be it remembered, that heretofore, and on, to wit, the twenty-second day of June, A. D. 1907, the same being one of the regular juridical days of the May term, A. D. 1907, of said court:

Present: The Honorable Robert E. Lewis, district judge, the following proceeding was had and entered of record in said court, to wit:

In the matter of the grand jury.

At this day come the members of the grand jury, heretofore duly empanelled and sworn as grand jurors, and return into court now here the following true bills of indictment, to wit:

* * * * * * *

THE UNITED STATES OF AMERICA *vs.* ALEXANDER T. SULLENBERGER, James S. Hatcher, Ellis M. Hampton, Eph K. Caldwell, Robert E. Sloan, and Eudolphus M. Taylor.	2029.	Indictment for conspiracy.

(Endorsed:) A true bill.
(Signed) E. D. WALKER, *Foreman.*

2 And thereupon, it is ordered by the court that a bench warrant issue without delay against the defendants and returnable forthwith; and that the defendants be let to bail before an United States commissioner in the sum of five thousand dollars ($5,000) each for their appearance in this court from day to day and term to term to answer unto the indictment herein.

* * * * * * *

And said indictment is in words and figures as follows, to wit:

In the District Court of the United States of America for the District of Colorado of the May term in the year nineteen hundred and seven.

District of Colorado, ss:

The grand jurors for the United States of America impanelled and sworn in the District Court of the said United States for the District of Colorado and inquiring for that district, and upon their oaths present that Alexander T. Sullenberger, James S. Hatcher, Ellis M. Hampton, Eph K. Caldwell, Robert E. Sloan, and Eudolphus M.

Taylor, late of the city of Durango, in the said district, on the sixth day of June in the year nineteen hundred and one, and at the several times of the committing of the several overt acts hereafter in this indictment mentioned, and continuously at all times between the said sixth day of June in the year last aforesaid and the day of the presenting of this indict-

3 ment at Durango, aforesaid, in the said district, unlawfully, corruptly, wickedly, and maliciously did conspire, combine, confederate, and agree together, and with divers other persons to the said grand jurors unknown, indirectly to obtain from the said United States, for a certain corporation, to wit, The Pagosa Lumber Company, theretofore organized under the laws of the State of Colorado and then and there existing under that name, a large quantity, to wit, two thousand nine hundred and ninety acres of timber lands in excess of the quantity of such lands which the said corporation could lawfully obtain directly from the said United States, regard being had to the laws thereof pertaining to the entry and sale of such lands; which said timber lands so to be obtained then were lands lying within the Durango land district, in the said District of Colorado, which were surveyed vacant public lands of the said United States not included within any military, Indian, or other reservation, lands which had not been offered at public sale according to law, and which were unfit for cultivation, chiefly valuable tor timber, and open to entry at the land office of the said United States at Durango aforesaid under the laws of the said United States pertaining to the entry and sale of timber lands and under the regulations theretofore made and prescribed pursuant to law by the Commissioner of the General Land Office, with the approval of the Secretary of the Interior; descriptions of which said lands by legal subdi-

4 visions set forth in that part of this indictment where the said several defendants are charged with the committing of overt acts in procuring the execution and verification of certain documents, each entitled "Testimony of Claimant" by certain persons, respectively, in those documents named for presentation by them to the register of the said land office at Durango aforesaid, and through him to the said Commissioner and the said Secretary, in connection with the entry of the same lands by those persons in quantities allowed to them, respectively, by law, being overt acts numbered 1 to 18, both inclusive.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that the said timber lands were so to be obtained as aforesaid from the said United States for the said corporation by the said defendants soliciting and procuring the persons aforesaid for hire and under agreements with them separately to that end, to pay to the receiver of the said land office, with moneys to be furnished to them by the said corporation the price fixed by law therefor, make entries as individual entrymen, at the land office aforesaid, with the said register, of tracts of such lands in quantities respectively not exceeding the quantities allowed by the said laws and regulations,

secure patents from the said United States for the said lands to themselves as such entrymen, and make conveyances of the title to the said lands to the said corporation.

OVERT ACTS.

5 1. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that further in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said Alexander T. Sullenberger afterwards, to wit, on the sixth day of June, in the year nineteen hundred and one, at Durango, aforesaid, in the said district of Colorado, unlawfully did, by solicitation and promise of reward to him in some small sum of money, the amount whereof is to the said grand jurors unknown, induce and procure one Charles E. Meuser to execute and verify by his oath before the said register, a certain document, in the form prescribed by law and entitled "Testimony of claimant" for presentation by the said Charles E. Meuser to the said register, and through the said register to the said Commissioner and the said Secretary in connection with the entry by the said Charles E. Meuser at the said land office at Durango, of the following-described timber lands, to wit: The east half of the southwest quarter and the south half of the southeast quarter of section twenty-six, in township thirty-five north, and range two and one-half west, reference being had to the New Mexico principal meridian and its base line, containing one hundred and sixty acres.

2. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that further in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confed-
6 eration, and agreement, and to effect the object of the same, the said Alexander T. Sullenberger, afterwards, to wit, on the seventeenth day of June, in the year nineteen hundred and one, at Durango aforesaid, in the said district of Colorado, unlawfully did, by solicitation and promise of reward to him in some small sum of money, the amount whereof is to the grand jurors unknown, induce and procure one James W. Melrose to execute and verify by his oath before the said register a certain document, in the form prescribed by law and entitled "Testimony of claimant" for presentation by the said James W. Melrose to the said register, and through the said register to the said Commissioner and the said Secretary in connection with the entry by the said James W. Melrose at the said land office at Durango, of the following-described timber lands, to wit: The southwest quarter of the southeast quarter, the north half of the southeast quarter, and the southeast quarter of the northeast quarter of section thirty-three, in township thirty-four north, and range four west, reference being had to the New Mexico principal meridian and its base line, containing one hundred and sixty acres.

3. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that further in pursuance of the said unlawful, cor-

rupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said James S. Hatcher, Robert E. Sloan, and Rudolphus M. Taylor afterwards, to wit, on the twentieth day of June, in the year nineteen hundred and one, at Durango aforesaid, in the said district of Colorado, unlawfully did, by solicitation and promise of reward to him in some small sum of money, the amount whereof is to the said grand jurors unknown, induce and procure one Pedro Delgado to execute and verify by his oath before the said receiver a certain document in the form prescribed by law and entitled "Testimony of Claimant" for presentation by the said Pedro Delgado to the said register, and through the said register to the said Commissioner and the said Secretary, in connection with the entry by the said Pedro Delgado, at the said land office at Durango, of the following-described timber lands, to wit: The northeast quarter of the northeast quarter of section thirty-two, the northwest quarter of the northwest quarter of section thirty-three, and the south half of the southwest quarter of section twenty-eight in township thirty-five north and range three west, reference being had to the New Mexico principal meridian and its base line, containing one hundred and sixty acres.

7

4. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that further in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said James S. Hatcher afterwards, to wit, on the eighth day of July, in the year nineteen hundred and one, at Durango aforesaid, in the said district of Colorado, unlawfully did, by solicitation and promise of reward to him, in some small sum of money, the amount whereof is to the said grand jurors unknown, induce and procure one Perry Wheatland to execute and verify by his oath before the said register, a certain document, in the form prescribed by law and entitled "Testimony of Claimant" for presentation by the said Perry Wheatland to the said register, and through the said register to the said Commissioner and the said Secretary, in connection with the entry by the said Perry Wheatland, at the said land office at Durango of the following-described timber lands, to wit: The northeast quarter of the northeast quarter of section eighteen, the southeast quarter of the southeast quarter of section seven, and the south half of the southwest quarter of section eight, in township thirty-four north and range three west, reference being had to the New Mexico principal meridian and its base line, containing one hundred and sixty acres.

8

5. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that further in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said James S. Hatcher afterwards, to wit, on the sixth day of August, in the year ninteeen hundred and one, at Durango aforesaid, in the said Dis-

trict of Colorado, unlawfully did, by solicitation and prom-
9 ise of reward to her in some small sum of money the amount whereof is to the said grand jurors unknown, induce and procure one Helena Hersch to execute and verify by her oath before the said receiver, a certain document, in the form prescribed by law and entitled "Testimony of Claimant," for presentation by the said Helena Hersch to the said register, and through the said register to the said Commissioner and the said Secretary, in connection with the entry by the said Helena Hersch, at the said land office at Durango, of the following-described timber lands, to wit: The east half of the southwest quarter, the northwest quarter of the southwest quarter and the southeast quarter of the northwest quarter of section seven, in township thirty-five north and range two west, reference *beging* had to the New Mexico principal meridian and its base line, containing one hundred and sixty acres.

6. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that further in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said James S. Hatcher afterwards, to wit, on the sixth day of August, in the year nineteen hundred and one, at Durango aforesaid, in the said District of Colorado, unlawfully did, by solicitation and prom-
10 ise of reward to her in some small sum of money the amount whereof is to the said grand jurors unknown, induce and procure one Henrietta Hatcher to execute and verify by her oath before the said receiver, a certain document, in the form prescribed by law and entitled "Testimony of Claimant," for presentation by the said Henrietta Hatcher to the said register, and through the said register to the said Commissioner and the said Secretary, in connection with the entry by the said Henrietta Hatcher, at the said land office at Durango, of the following-described timber lands, to wit: The south half of the southeast quarter, the northwest quarter of the southeast quarter, and the southeast quarter of the southwest quarter, of section one, in township thirty-five north and range two and one-half west, reference being had to the New Mexico principal meridian and its base line, containing one hundred and sixty acres.

7. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that further in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said James S. Hatcher afterwards, to wit, on the seventh day of August, in the year nineteen hundred and one, at Durango aforesaid, in the said District of Colorado, unlawfully did, by solicitation and prom-
11 ise of reward to him in some small sum of money the amount whereof is to the said grand jurors unknown, induce and procure one Charles Anderson to execute and verify by his oath before the said receiver, a certain document, in the form prescribed by law and entitled "Testimony of Claimant," for presentation by

the said Charles Anderson to the said register, and through the said register to the said Commissioner and the said Secretary, in connection with the entry by the said Charles Anderson, at the said land office at Durango, of the following-described timber lands, to wit: The northeast quarter of the southeast quarter of section thirty-five, the southeast quarter of the southeast quarter of section twenty-six, and the west half of the southwest quarter of section twenty-five, in township thirty-six north and range two and one-half west, reference being had to the New Mexico principal meridian and its base line, containing one hundred and sixty acres.

8. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that further in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said Alexander T. Sullenberger, Eph K. Caldwell, and James S. Hatcher afterwards, to wit, on the nineteenth day of September, in the same year nineteen hundred and one, at Durango aforesaid,
12 in the said district of Colorado, unlawfully did, by solicitation and promise of reward to him in some small sum of money the amount whereof is to the said grand jurors unknown, induce and procure one Roy W. Fitzhugh to execute and verify by his oath before the said receiver, a certain document, in the form prescribed by law and entitled "Testimony of Claimant," for presentation by the said Roy W. Fitzhugh to the said register, and through the said register to the said Commissioner and the said Secretary, in connection with the entry by the said Roy W. Fitzhugh, at the said land office at Durango, of the following-described timber lands, to wit: The north half of the northwest quarter of section thirteen, and the south half of the southwest quarter of section twelve, in township thirty-four north and range three west, reference being had to the New Mexico principal meridian and its base line, containing one hundred and sixty acres.

9. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that further in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said Alexander T. Sullenberger and James S. Hatcher afterwards, to wit, on the twentieth day of September, in the same year nineteen hundred
13 and one, at Durango aforesaid, in the said District of Colorado, unlawfully did, by solicitation and promise of reward to him in some small sum of money, the amount whereof is to the said grand jurors unknown, induce and procure one Delbert Kimball to execute and verify by his oath before the said register a certain document, in the form prescribed by law and entitled "Testimony of claimant," for presentation by the said Delbert Kimball to the said register, and through the said register to the said Commissioner and the said Secretary, in connection with the entry by the said Delbert Kimball, at the said land office at Durango, of the following-described timber lands, to wit: The north half of the northwest quarter, and the south-

west quarter of the northwest quarter of section twenty-four, and the southeast quarter of the northeast quarter of section twenty-three, in township thirty-four north and range three west, reference being had to the New Mexico principal meridian and its base line, containing one hundred and sixty acres.

10. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that further in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said Ellis M. Hampton and Eph. K. Caldwell afterwards, to wit, on the
14 fifth day of September, in the year nineteen hundred and four, at Pagosa Springs, in the said District of Colorado, unlawfully did, by solicitation and promise of reward to him in some small sum of money, the amount whereof is to the said grand jurors unknown, induce and procure one Charles H. Loucks to execute and verify by his oath before the said Rudolphus M. Taylor, as judge of the County Court for the county of Archuleta, Colorado, a certain document, in the form prescribed by law and entitled "Testimony of claimant," for presentation by the said Charles H. Loucks to the said register, and through the said register to the said Commissioner and the said Secretary, in connection with the entry by the said Charles H. Loucks, at the said land office at Durango, of the following-described timber lands, to wit: The southwest quarter of the northeast quarter, the southeast quarter of the northwest quarter, and the east half of the southwest quarter of section fifteen, in township thirty-three north and range four west, reference being had to the New Mexico principal meridian and its base line, containing one hundred and sixty acres.

11. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that further in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said
15 James S. Hatcher afterwards, to wit, on the thirty-first day of July in the year nineteen hundred and six, at Pagosa Springs, in the said District of Colorado, unlawfully did, by solicitation and promise of reward to him in some small sum of money the amount whereof is to the said grand jurors unknown, induce, and procure one Jefferson D. Keith to execute and verify by his oath before the said Eph K. Caldwell, as county judge of Archuleta County, Colorado, a certain document, in the form prescribed by law and entitled "Testimony of Claimant," for presentation by the said Jefferson D. Keith to the said register, and through the said register to the said Commissioner and the said Secretary, in connection with the entry by the said Jefferson D. Keith, at the said land office at Durango, of the following-described timber lands, to wit: The northeast quarter of the northeast quarter of section thirty-one, and the east half of the southeast quarter of section thirty, and the northwest quarter of the southwest quarter of section twenty-nine, in township thirty-four north and range two west, reference being had to the New Mexi-

co principal meridian and its base line, containing one hundred and sixty acres.

12. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that further in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said Ellis M. Hampton afterwards, to wit, on the fifteenth day of August, in the year nineteen hundred and six, at Pagosa Springs, in the said District of Colorado, unlawfully did, by solicitation and promise of reward to her in some small sum of money the amount whereof is to the said grand jurors unknown, induce, and procure one Ruby A. Howe to execute and verify by her oath before the said Eph K. Caldwell, as county judge of Archuleta County, Colorado, a certain document, in the form prescribed by law and entitled "Testimony of Claimant," for presentation by the said Ruby A. Howe, to the said register, and through the said register to the said Commissioner and the said Secretary, in connection with the entry by the said Ruby A. Howe, at the said land office at Durango, of the following-described timber lands, to wit: The west half of the southeast quarter and the northeast quarter of the southeast quarter of section twelve, in township thirty-four north and range two west, reference being had to the New Mexico principal meridian and its base line, containing one hundred and sixty acres.

13. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that further in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said Ellis M. Hampton afterwards, to wit, on the seventeenth day of August, in the year nineteen hundred and six, at Pagosa Springs, in the said district of Colorado, unlawfully did, by solicitation and promise of reward to him in some small sum of money the amount whereof is to the said grand jurors unknown, induce and procure one William W. Mullins to execute and verify by his oath before one Bernard Hampton, as clerk of the District Court for the county of Archuleta, Colorado, a certain document, in the form prescribed by law and entitled "Testimony of Claimant," for presentation by the said William W. Mullins to the said register, and through the said register to the said Commissioner and the said Secretary, in connection with the entry by the said William W. Mullins, at the said land office at Durango, of the following-described timber lands, to wit: The northwest quarter of the northeast quarter, the north half of the northwest quarter, and the southwest quarter of the northwest quarter of section thirty-four, in township thirty-six north and range two west, reference being had to the New Mexico principal meridian and its base line, containing one hundred and sixty acres.

14. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that further in pursuance of the said unlawful, cor-

rupt, wicked, and malicious conspiracy, combination, confeder-
18 ation, and agreement, and to effect the object of the same, the said Alexander T. Sullenberger, Ellis M. Hampton and Eph K. Caldwell afterwards, to wit, on the twenty-fourth day of September, in the year nineteen hundred and six, at Pagosa Springs, in the said District of Colorado, unlawfully did, by solicitation and promise of reward to him in some small sum of money the amount whereof is to the said grand jurors unknown, induce, and procure one Caspar Martinez to execute and verify by his oath before the said Eph K. Caldwell, as county judge of Archuleta County, Colorado, a certain document, in the form prescribed by law and entitled "Testimony of Claimant," for presentation by the said Caspar Martinez to the said register, and through the said register to the said Commissioner and the said Secretary, in connection with the entry by the said Caspar Martinez, at the said land office at Durango, of the following-described timber lands, to wit: The southeast quarter of the northeast quarter, and the northeast quarter of the southeast quarter, of section thirty-five, and the northwest quarter of the southwest quarter of section thirty-six, in township thirty-four north and range two west, reference being had to the New Mexico principal meridian and its base line, containing one hundred and twenty acres.

15. And the grand jurors aforesaid, upon their oaths aforesaid, do further present that further, in pursuance of the said unlaw-
19 ful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said Ellis M. Hampton afterwards, to wit, on the twenty-second day of October, in the year nineteen hundred and six, at Pagosa Springs, in the said District of Colorado, unlawfully did, by solicitation and promise of reward to him in some small sum of money the amount whereof is to the said grand jurors unknown, induce and procure one Grant Shields to execute and verify by his oath before one Barnard Hampton, as clerk of the District Court for the county of Archuleta, Colorado, a certain document, in the form prescribed by law and entitled "Testimony of Claimant," for presentation by the said Grant Shields to the said register, and through the said register to the said Commissioner and the said Secretary, in connection with the entry by the said Grant Shields, at the said land office at Durango, of the following-described timber lands, to wit: The southeast quarter of section fourteen in township thirty-four north and range two west, reference being had to the New Mexico principal meridian and its base line, containing one hundred and sixty acres.

16. And the grand jurors aforesaid, upon their oaths aforesaid, do further present that further, in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, con-
20 federation, and agreement, and to effect the object of the same, the said Ellis M. Hampton afterwards, to wit, on the twenty-third day of October, in the year nineteen hundred and six, at Pagosa

Springs, in the said District of Colorado, unlawfully did, by solicitation and promise of reward to her in some small sum of money the amount whereof is to the said grand jurors unknown, induce and procure one Jessie V. Shields to execute and verify by her oath before one Barnard Hampton, clerk of the District Court for the county of Archuleta, Colorado, a certain document, in the form prescribed by law and entitled "Testimony of Claimant," for presentation by the said Jessie V. Shields to the said register, and through the said register to the said Commissioner and the said Secretary, in connection with the entry by the said Jessie V. Shields, at the said land office at Durango, of the following-described timber lands, to wit: The southwest quarter of the southwest quarter of section six in township thirty-four north and range one west, and lots one and two in section one, and the northwest quarter of the northeast quarter of section twelve in township thirty-four north and range two west, reference being had to the New Mexico principal meridian and its base line, containing one hundred and sixty acres.

17. And the grand jurors aforesaid, upon their oaths aforesaid, do further present that further, in pursuance of the said
21 unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said Ellis M. Hampton afterwards, to wit, on the twenty-third day of October, in the year nineteen hundred and six, at Pagosa Springs, in the said District of Colorado, unlawfully did, by solicitation and promise of reward to her in some small sum of money the amount whereof is to the said grand jurors unknown, induce and procure one Eva A. Everett to execute and verify by her oath before one Barnard Hampton, as clerk of the District Court for the county of Archuleta, Colorado, a certain document, in the form prescribed by law and entitled "Testimony of Claimant," for presentation by the said Eva A. Everett to the said register, and through the said register to the said Commissioner and the said Secretary, in connection with the entry by the said Eva A. Everett, at the said land office at Durango, of the following-described timber lands, to wit: The south half of the northwest quarter, and the west half of the southwest quarter, of section twelve in township thirty-four north and range two west, reference being had to the New Mexico principal meridian and its base line, containing one hundred and sixty acres.

18. And the grand jurors aforesaid, upon their oaths aforesaid, do further present that further, in pursuance of the said
22 unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said Ellis M. Hampton afterwards, to wit, on the twenty-fifth day of October, in the year nineteen hundred and six, at Pagosa Springs, in the said District of Colorado, unlawfully did, by solicitation and promise of reward to her in some small sum of money the amount whereof is to the said grand jurors unknown, induce and procure one Mary C. Brown to execute and verify by her

oath before the said Eph K. Caldwell, as county judge of Archuleta County, Colorado, a certain document, in the form prescribed by law and entitled "Testimony of Claimant," for presentation by the said Mary C. Brown to the said register, and through the said register to the said Commissioner and the said Secretary, in connection with the entry by the said Mary C. Brown, at the said land office at Durango, of the following-described timber lands, to wit: Lots numbered three, four, and five of section six in township thirty-four north and range one west, and lot numbered four of section thirty-one in township thirty-five north and range one west, reference being had to the New Mexico principal meridian and its base line, containing one hundred and fifty acres.

19. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that further in pursuance of the said
23 unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said James S. Hatcher afterwards, to wit, on the twenty-sixth day of October, in the year nineteen hundred and six, at Pagosa Springs, in the said District of Colorado, unlawfully did, by solicitation and promise of reward to him in some small sum of money the amount whereof is to the said grand jurors unknown, induce and procure one Henry Brown to execute and verify by his oath before the said Eph K. Caldwell, as county judge of Archuleta County, Colorado, a certain document, in the form prescribed by law and entitled "Testimony of Claimant," for presentation by the said Henry Brown to the said register, and through the said register to the said Commissioner and the said Secretary, in connection with the entry by the said Henry Brown, at the said land office at Durango, of the following-described timber lands, to wit: The east half of the northwest quarter and the south half of the northeast quarter of section twenty-three, in township thirty-four north and range two west, reference being had to the New Mexico principal meridian and its base line, containing one hundred and sixty acres.

20. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that further in pursuance of the said
24 unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said Robert E. Sloan afterwards, to wit, on the sixth day of June, in the year nineteen hundred and one, at Pagosa Springs aforesaid, in the said District of Colorado, in behalf of the said corporation, unlawfully did furnish to the said Charles E. Meuser a sum of money, to wit, the sum of four hundred dollars, for use by him the said Charles E. Meuser in making payment to the said receiver of the said land office of the price fixed by law for the timber lands herein above described in overt act numbered 1, then being entered by the said Charles E. Meuser at the said land office.

21. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that further in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confedera-

tion, and agreement and to effect the object of the same, the said Robert E. Sloan and Alexander T. Sullenberger afterwards, to wit, on the seventeenth day of June, in the year nineteen hundred and one, at Pagosa Springs aforesaid, in the said District of Colorado, in behalf of the said corporation, unlawfully did furnish to the said James W. Melrose a sum of money, to wit, the sum of four hundred dollars, for use by him the said James W. Melrose in making payment to the said receiver of the said land office of the price fixed by law for the timber lands hereinabove described in overt act numbered 2, then being entered by the said James W. Melrose at the said land office.

22. And the grand jurors aforesaid, upon their oaths aforesaid do further present, that further in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said Robert E. Sloan afterwards, to wit, on the twentieth day of June, in the year nineteen hundred and one, at Pagosa Springs aforesaid, in the said District of Colorado, in behalf of the said corporation, unlawfully did furnish to the said Pedro Delgado a sum of money, to wit, the sum of four hundred dollars, for use by him the said Pedro Delgado in making payment to the said receiver of the said land office of the price fixed by law for the timber lands herein above described in overt act numbered 3, then being entered by the said Pedro Delgado at the said land office.

23. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that further in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said Eph K. Caldwell afterwards, to wit, on the eighth day of July, in the year nineteen hundred and one, at Pagosa Springs aforesaid, in the said District of Colorado, in behalf of the said corporation, unlawfully did furnish to the said Perry Wheatland a sum of money, to wit, the sum of four hundred dollars for use by him the said Perry Wheatland in making payment to the said receiver of the said land office of the price fixed by law for the timber lands herein above described in overt act numbered 4, then being entered by the said Perry Wheatland at the said land office.

24. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that further in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said James S. Hatcher afterwards, to wit, on the sixth day of August, in the year nineteen hundred and one, at Pagosa Springs aforesaid, in the said District of Colorado, in behalf of the said corporation, unlawfully did furnish to the said Helena Hersch a sum of money, to wit, the sum of four hundred dollars, for use by her, the said Helena Hersch, in making payment to the said receiver of the said land office of the price fixed by law for the timber lands herein above described in

overt act numbered 5, then being entered by the said Helena Hersch at the said land office.

25. And the grand jurors aforesaid, upon their oaths afore-
27 said, do further present, that further in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said James S. Hatcher afterwards, to wit, on the sixth day of August, in the year nineteen hundred and one, at Pagosa Springs aforesaid, in the said District of Colorado, in behalf of the said corporation, unlawfully did furnish to the said Henrietta Hatcher a sum of money, to wit, the sum of four hundred dollars, for use by her, the said Henrietta Hatcher, in making payment to the said receiver of the said land office of the price fixed by law for the timber lands herein above described in overt act numbered 6, then being entered by the said Henrietta Hatcher at the said land office.

26. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that further in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said Alexander T. Sullenberger afterwards, to wit, on the seventh day of August, in the year nineteen hundred and one, at Pagosa Springs aforesaid, in the said District of Colorado, in behalf of the said corporation, unlawfully did furnish to the said Charles Anderson
28 a sum of money, to wit, the sum of four hundred dollars, for use by him, the said Charles Anderson, in making payment to the said receiver of the said land office of the price fixed by law for the timber lands herein above described in overt act numbered 7, then being entered by the said Charles Anderson at the said land office.

27. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that further in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said Eph K. Caldwell afterwards, to wit, on the nineteenth day of September, in the year nineteen hundred and one, at Pagosa Springs aforesaid, in the said District of Colorado, in behalf of the said corporation, unlawfully did furnish to the said Roy W. Fitzhugh a sum of money, to wit, the sum of four hundred dollars, for use by him, the said Roy W. Fitzhugh, in making payment to the said receiver of the said land office of the price fixed by law for the timber lands herein above described in overt act numbered 8, then being entered by the said Roy W. Fitzhugh at the said land office.

28. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that further in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confed-
29 eration, and agreement, and to effect the object of the same, the said Alexander T. Sullenberger afterwards, to wit, on the twentieth day of September, in the year nineteen hundred and one,

at Pagosa Springs aforesaid, in the said District of Colorado, in behalf of the said corporation, unlawfully did furnish to the said Delbert Kimball a sum of money, to wit, the sum of four hundred dollars, for use by him, the said Delbert Kimball, in making payment to the said receiver of the said land office of the price fixed by law for the timber lands herein above described in overt act numbered 9, then being entered by the said Delbert Kimball at the said land office.

29. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that further in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said Ellis M. Hampton afterwards, to wit, on the fifth day of September, in the year nineteen hundred and four, at Pagosa Springs aforesaid, in the said District of Colorado, in behalf of the said corporation, unlawfully did furnish to the said Charles H. Loucks a sum of money, to wit, the sum of four hundred dollars, for use by him, the said Charles H. Loucks, in making payment to the said receiver of the said land office of the price fixed by law for the timber lands herein
30 above described in overt act numbered 10, then being entered by the said Charles H. Loucks at the said land office.

30. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that further in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said James S. Hatcher afterwards, to wit, on the thirty-first day of July, in the year nineteen hundred and six, at Pagosa Springs aforesaid, in the said District of Colorado, in behalf of the said corporation, unlawfully did furnish to the said Jefferson D. Keith a sum of money, to wit, the sum of four hundred dollars, for use by him the said Jefferson D. Keith in making payment to the said receiver of the said land office of the price fixed by law for the timber lands herein above described in overt act numbered 11, then being entered by the said Jefferson D. Keith at the said land office.

31. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that further in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said Ellis M. Hampton afterwards, to wit, on the fifteenth day of August, in the year nineteen hundred and six, at Pagosa Springs aforesaid, in the said District of Colorado, in behalf of the said corporation, un-
31 lawfully did furnish to the said Ruby A. Howe a sum of money, to wit, the sum of four hundred dollars, for use by her the said Ruby A. Howe in making payment to the said receiver of the said land office of the price fixed by law for the timber lands herein above described in overt act numbered 12, then being entered by the said Ruby A. Howe at the said land office.

32. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that further in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation,

and agreement, and to effect the object of the same, the said Ellis M. Hampton afterwards, to wit, on the seventeenth day of August, in the year nineteen hundred and six, at Pagosa Springs aforesaid, in the said District of Colorado, in behalf of the said corporation, unlawfully did furnish to the said William W. Mullins a sum of money, to wit, the sum of four hundred dollars, for use by him the said William W. Mullins in making payment to the said receiver of the said land office of the price fixed by law for the timber lands herein above described in overt act numbered 13, then being entered by the said William W. Mullins at the said land office.

33. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that further in pursuance of the said unlawful,
32 corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said Ellis M. Hampton afterwards, to wit, on the twenty-fourth day of September, in the year nineteen hundred and six, at Pagosa Springs aforesaid, in the said District of Colorado, in behalf of the said corporation, unlawfully did furnish to the said Gaspar Martinez a sum of money, to wit, the sum of three hundred dollars, for use by him the said Gaspar Martinez in making payment to the said receiver of the said land office of the price fixed by law for the timber lands herein above described in overt act numbered 14, then being entered by the said Gaspar Martinez at the said land office.

34. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that further in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said Ellis M. Hampton afterwards, to wit, on the twenty-second day of October, in the year nineteen hundred and six, at Pagosa Springs aforesaid, in the said District of Colorado, in behalf of the said corporation, unlawfully did furnish to the said Grant Shields a sum of money, to wit, the sum of four hundred dollars for use by him the said Grant Shields in making payment to the said receiver of the said
33 land office of the price fixed by law for the timber lands herein above described in overt act numbered 15, then being entered by the said Grant Shields at the said land office.

35. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that further in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said Ellis N. Hampton afterwards, to wit, on the twenty-third day of October, in the year nineteen hundred and six, at Pagosa Springs aforesaid, in the said District of Colorado, in behalf of the said corporation, unlawfully did furnish to the said Jessie V. Shields a sum of money, to wit, the sum of four hundred dollars, for use by her the said Jessie V. Shields in making payment to the said receiver of the said land office of the price fixed by law for the timber lands herein

above described in overt act numbered 16, then being entered by the said Jessie V. Shields at the said land office.

36. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that further in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said
34 Elis N. Hampton afterwards, to wit, on the twenty-third day of October, in the year nineteen hundred and six, at Pagosa Springs aforesaid, in the said District of Colorado, in behalf of the said corporation, unlawfully did furnish to the said Eva A. Everett a sum of money, to wit, the sum of four hundred dollars, for use by her the said Eva A. Everett in making payment to the said receiver of the said land office of the price fixed by law for the timber lands herein above described in overt act numbered 17, then being entered by the said Eva A. Everett at the said land office.

37. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that further in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said James S. Hatcher afterwards, to wit, on the twenty-fifth day of October, in the year nineteen hundred and six, at Pagosa Springs aforesaid, in the said District of Colorado, in behalf of the said corporation, unlawfully did furnish to the said Mary C. Brown a sum of money, to wit, the sum of four hundred dollars, for use by her the said Mary C. Brown in making payment to the said receiver of the said land office of the price fixed by law for the timber lands herein above described in overt act numbered 18, then being entered by the said Mary
35 C. Brown at the said land office.

38. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that further in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said Ellis M. Hampton afterwards, to wit, on the twenty-sixth day of October, in the year nineteen hundred and six, at Pagosa Springs aforesaid, in the said District of Colorado, in behalf of the said corporation, unlawfully did furnish to the said Mary C. Brown a sum of money, to wit, the sum of four hundred dollars, for use by him the said Henry Brown in making payment to the said receiver of the said land office of the price fixed by law for the timber lands herein above described in overt act numbered 19, then being entered by the said Henry Brown at the said land office.

39. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that further in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said defendants afterwards, to wit, on the first day of June, in the year nineteen hundred and one, at Pagosa Springs, in the said District of Colorado,

unlawfully did require and procure the said Charles E. Meuser
36 to sign and execute a certain deed of conveyance, to wit, a deed of the said Charles E. Meuser dated that day, conveying the title to the lands described in overt act numbered 1 from the said Charles E. Meuser as grantor, to the said Pagosa Lumber Company, a corporation as aforesaid, as grantee.

40. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that further in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said defendants afterwards, to wit, on the first day of September, in the year nineteen hundred and one, at Pagosa Springs, in the said District of Colorado, unlawfully did require and procure the said James W. Melrose to sign and execute a certain deed of conveyance, to wit, a deed of the said James W. Melrose, dated that day, conveying the title to the lands described in overt act numbered 2 from the said James W. Melrose as grantor, to the said Pagosa Lumber Company, corporation as aforesaid, as grantee.

41. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that further in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said defend-
37 ants afterwards, to wit, on the first day of July, in the year nineteen hundred and one, at Pagosa Springs, in the said District of Colorado, unlawfully did require and procure the said Pedro Delgado to sign and execute a certain deed of conveyance, to wit, a deed of the said Pedro Delgado, dated that day, conveying the title to the lands described in overt act numbered 3 from the said Pedro Delgado as grantor, to the said Pagosa Lumber Company, corporation as aforesaid, as grantee.

42. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that further in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said defendants afterwards, to wit, on the first day of September, in the year nineteen hundred and one, at Pagosa Springs, in the said District of Colorado, unlawfully did require and procure the said Perry Wheatland to sign and execute a certain deed of conveyance, to wit, a deed of the said Perry Wheatland, dated that day, conveying the title to the lands described in overt act numbered 4 from the said Perry Wheatland as grantor, to the said Pagosa Lumber Company, corporation as aforesaid, as grantee.

43. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that further in pursuance of the said unlawful, cor-
38 rupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said defendants afterwards, to wit, on the fourteenth day of August, in the year nineteen hundred and one, at Pagosa Springs, in

the said District of Colorado, unlawfully did require and procure the said Helena Hersch to sign and execute a certain deed of conveyance, to wit, a deed of the said Helena Hersch, dated that day, conveying the title to the lands described in overt act numbered 5 from the said Helena Hersch as grantor, to the Hatcher Mercantile Company, a corporation, as grantee.

44. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that further in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said defendants afterwards, to wit, on the fourteenth day of August, in the year nineteen hundred and one, at Pagosa Springs, in the said District of Colorado, unlawfully did require and procure the said Henrietta Hatcher to sign and execute a certain deed of conveyance, to wit, a deed of the said Henrietta Hatcher, dated that day, conveying the title to the lands described in overt act numbered 6 from the said Henrietta Hatcher as grantor, to the said Pagosa Lumber Company, corporation as aforesaid, as grantee.

45. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that further in pursuance of the said
39 unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said defendants afterwards, to wit, on the seventh day of August, in the year nineteen hundred and one, at Pagosa Springs, in the said District of Colorado, unlawfully did require and procure the said Charles Anderson to sign and execute a certain deed of conveyance, to wit, a deed of the said Charles Anderson, dated that day, conveying the title to the lands described in overt act numbered 7 from the said Charles Anderson as grantor, to the said Pagosa Lumber Company, corporation as aforesaid, as grantee.

46. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that further in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said defendants afterwards, to wit, on the first day of September, in the year nineteen hundred and one, at Pagosa Springs, in the said District of Colorado, unlawfully did require and procure the said Roy W. Fitzhugh to sign and execute a certain deed of conveyance, to wit, a deed of the said Roy W. Fitzhugh, dated that day, conveying the title to the lands described in overt act numbered 8 from the said Roy W. Fitzhugh as grantor, to the said Pagosa Lumber Company, corporation as aforesaid, as grantee.

40 47. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that further in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said defendants afterwards, to wit, on the twenty-sixth day of October, in the year nineteen hundred and one, at Pagosa Springs, in the said District of Colorado, unlawfully did require and procure the

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said Delbert Kimball to sign and execute a certain deed of conveyance, to wit, a deed of the said Delbert Kimball, dated that day, conveying the title to the lands described in overt act numbered 9 from the said Delbert Kimball as grantor, to the said Pagosa Lumber Company, corporation as aforesaid, as grantee.

48. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that further in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said defendants afterwards, to wit, on the first day of October, in the year nineteen hundred and four, at Pagosa Springs in the said District of Colorado, unlawfully did require and procure the said Charles H. Loucks, to sign and execute a certain deed of conveyance, to wit, a deed of the said Charles H. Loucks, dated that day, conveying
41 the title to the lands described in overt act numbered 10 from the said Charles H. Loucks as grantor, to the said Pagosa Lumber Company, corporation as aforesaid, as grantee.

50. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that further in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said defendants afterwards, to wit, on the twenty-sixth day of October, in the year nineteen hundred and six, at Pagosa Springs, in the said District of Colorado, unlawfully did require and procure the said Jefferson D. Keith to sign and execute a certain deed of conveyance, to wit, a deed of the said Jefferson D. Keith, dated that day, conveying the title to the lands described in overt act numbered 11 from the said Jefferson D. Keith as grantor, to the said Pagosa Lumber Company, corporation as aforesaid, as grantee.

50. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that further in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said defendants afterwards, to wit, on the fifteenth day of November, in the year nineteen hundred and six, at Pagosa Springs, in the said District of Colorado, unlawfully did require and procure the
42 said Ruby A. Howe to sign and execute a certain deed of conveyance, to wit, a deed of the said Ruby A. Howe, dated that day, conveying the title to the lands described in overt act numbered 12 from the said Ruby A. Howe as grantor, to the said Pagosa Lumber Company, corporation as aforesaid, as grantee.

51. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that further in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said defendants afterwards, to wit, on the fourth day of September, in the year nineteen hundred and six, at Pagosa Springs, in the said district of Colorado, unlawfully did require and procure the said William W. Mullins to sign and execute a certain deed of conveyance, to wit, a

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deed of the said William W. Mullins, dated that day, conveying the title to the lands described in overt act numbered 13 from the said William W. Mullins as grantor to the said Pagosa Lumber Company, corporation as aforesaid, as grantee.

52. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that further in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said defendants afterwards, to wit, on the twenty-fourth day
43 of September, in the year nineteen hundred and six at Pagosa Springs, in the said District of Colorado, unlawfully did require and procure the said Gaspar Martinez to sign and execute a certain deed of conveyance, to wit, a deed of the said Gaspar Martinez, dated that day, conveying the title to the lands described in overt act numbered 14 from the said Gaspar Martinez as grantor to the said Pagosa Lumber Company, corporation as aforesaid, as grantee.

53. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that further in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said defendants afterwards, to wit, on the fourteenth day of November, in the year nineteen hundred and six, at Pagosa Springs, in the said District of Colorado, unlawfully did require and procure the said Grant Shields to sign and execute a certain deed of conveyance, to wit, a deed of the said Grant Shields, dated that day, conveying the title to the lands described in overt act numbered 15 from the said Grant Shields as grantor to the said Pagosa Lumber Company, corporation as aforesaid, as grantee.

54. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that further in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination,
44 confederation, and agreement, and to effect the object of the same, the said defendants afterwards, to wit, on the fourteenth day of November, in the year nineteen hundred and six, at Pagosa Springs, in the said District of Colorado, unlawfully did require and procure the said Jessie V. Shields to sign and execute a certain deed of conveyance, to wit, a deed of the said Jessie V. Shields, dated that day, conveying the title to the lands described in overt act numbered 16 from the said Jessie V. Shields as grantor to the said Pagosa Lumber Company, corporation as aforesaid, as grantee.

55. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that further in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said defendants afterwards, to wit, on the fourteenth day of November, in the year nineteen hundred and six, at Pagosa Springs, in the said District of Colorado, unlawfully did require and procure the said Eva

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A. Everett to sign and execute a certain deed of conveyance, to wit, a deed of the said Eva A. Everett, dated that day, conveying the title to the lands described in overt act numbered 17 from the said Eva A. Everett as grantor to the said Pagosa Lumber Company, corporation as aforesaid, as grantee.

56. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that further in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said defendants afterwards, to wit, on the thirteenth day of November, in the year nineteen hundred and six, at Pagosa Springs, in the said District of Colorado, unlawfully did require and procure the said Mary C. Brown to sign and execute a certain deed of conveyance, to wit, a deed of the said Mary C. Brown, dated that day, conveying the title to the lands described in overt act numbered 18 from the said Mary C. Brown as grantor to the said Pagosa Lumber Company, corporation as aforesaid, as grantee.

57. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that further in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said defendants afterwards, to wit, on the thirteenth day of November, in the year nineteen hundred and six, at Pagosa Springs, in the said District of Colorado, unlawfully did require and procure the said Henry Brown to sign and execute a certain deed of conveyance, to wit, a deed of the said Henry Brown, dated that day, conveying the title to the lands described in overt act numbered 19 from the said Henry Brown as grantor to the said Pagosa Lumber Company, corporation as aforesaid, as grantee.

58. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that further in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said defendants afterwards, to wit, on the fifth day of May, in the year nineteen hundred and five, at the city of Washington, in the District of Columbia, unlawfully did cause and procure the issuance by the said United States of a patent for the lands described in overt act numbered 1, running to the said Charles E. Meuser, entryman thereof as in that overt act set forth.

59. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that further in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said defendants afterwards, to wit, on the fifth day of May, in the year nineteen hundred and five, at the city of Washington, in the District of Columbia, unlawfully did cause and procure the issuance by the said United States of a patent for the lands described in overt act numbered 2, running to the said James W. Melrose, entryman thereof as in that overt act set forth.

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60. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that further in pursuance of the said
47 unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said defendants afterwards, to wit, on the fifth day of May, in the year nineteen hundred and five, at the city of Washington, in the District of Columbia, unlawfully did cause and procure the issuance by the said United States of a patent for the lands described in overt act numbered 3, running to the said Pedro Delgado, entryman thereof as in that overt act set forth.

61. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that further in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said defendants afterwards, to wit, on the fifth day of May, in the year nineteen hundred and five, at the city of Washington, in the District of Columbia, unlawfully did cause and procure the issuance by the said United States of a patent for the lands described in overt act numbered 4, running to the said Perry Wheatland, entryman thereof as in that overt act set forth.

62. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that further in pursuance of the said unlawful,
48 corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said defendants afterwards, to wit, on the fifth day of May, in the year nineteen hundred and five, at the city of Washington, in the District of Columbia, unlawfully did cause and procure the issuance by the said United States of a patent for the lands described in overt act numbered 5, running to the said Helena Hersch, entryman thereof as in that overt act set forth.

63. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that further in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said defendants afterwards, to wit, on the fifth day of May, in the year nineteen hundred and five, at the city of Washington, in the District of Columbia, unlawfully did cause and procure the issuance by the said United States of a patent for the lands described in overt act numbered 6, running to the said Henrietta Hatcher, entryman thereof as in that overt act set forth.

64. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that further in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said
49 defendants afterwards, to wit, on the thirtieth day of June, in the year nineteen hundred and five, at the city of Washington, in the District of Columbia, unlawfully did cause and procure the issuance by the said United States of a patent for the lands described

in overt act numbered 7, running to the said Charles Anderson, entryman thereof as in that overt act set forth.

65. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that further in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said defendants afterwards, to wit, on the fifth day of May, in the year nineteen hundred and five, at the city of Washington, in the District of Columbia, unlawfully did cause and procure the issuance by the said United States of a patent for the lands described in overt act numbered 8, running to the said Roy W. Fitzhugh, entryman thereof as in that overt act set forth.

66. And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that further in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said defendants afterwards, to wit, on the fifth day of May, in the year nineteen hundred and five, at the city of Washington, in the District of
50 Columbia, unlawfully did cause and procure the issuance by the said United States of a patent for the lands described in overt act numbered 9, running to the said Delbert Kimball, entryman thereof as in that overt act set forth.

67. And the grand jurors aforesaid, upon their oaths aforesaid, do further present that further, in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement and to effect the object of the same, the said defendants afterwards, to wit, on the twenty-ninth day of May, in the year nineteen hundred and five, at the city of Washington, in the District of Columbia, unlawfully did cause and procure the issuance by the said United States of a patent for the lands described in overt act numbered 10, running to the said Charles H. Loucks, entryman thereof, as in that overt act set forth.

68. And the grand jurors aforesaid, upon their oaths aforesaid, do further present that further, in pursuance of the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said defendants afterwards, to wit, on the seventeenth day of December, in the year nineteen hundred and six, at the city of Washington, in the District of Columbia, unlawfully did cause and procure the issuance by the said United States of a patent for the lands described in overt act numbered 13, running to the said
51 William W. Mullins, entryman thereof, as in that overt act set forth.

And so the grand jurors aforesaid, upon their oaths aforesaid, do say that the said Alexander T. Sullenberger, James S. Hatcher, Ellis M. Hampton, Eph K. Caldwell, Robert E. Sloan, and Eudolphus M. Taylor, on the said sixth day of June, in the year nineteen hundred and one, and from thence hitherto, and at the several times

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of the committing of the said several overt acts in this indictment charged (the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, during all the time from the said day when the same was originally entered into, to wit, the said sixth day of June, in the year nineteen hundred and one, to the date of the presenting of this indictment, being still continuing and in existence), in manner and form in this indictment aforesaid, unlawfully, corruptly, wickedly, and maliciously did conspire, combine, confederate, and agree together, and with others, indirectly, deceitfully, and fraudulently to obtain from the said United States, for the said corporation, certain of the public lands and property of the said United States in quantity greatly in excess of the quantity which the said corporation could lawfully obtain directly from the said United States under a proper and lawful administration of the said laws and regulations, and thereby,
52 and in that manner, defraud the said United States of its valuable property in such lands, and also of its governmental function in the matter of preserving and disposing of the same lands, as well as out of its right to administer an intelligent and honest service in that behalf in the interests of the people of the said United States; against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided.

EARL M. CRANSTON,
United States Attorney.

(Endorsed:) No. 2029. United States District Court, District of Colorado. The United States of America v. Alexander T. Sullenberger, James S. Hatcher, Ellis M. Hampton, Eph. K. Caldwell, Robert E. Sloan and Eudolphus M. Taylor. Indictment: Conspiracy to defraud the United States. R. S. 5440 as amended. A true bill: E. D. Welker, foreman. Filed June 22, 1907. Charles W. Bishop, clerk.

UNITED STATES OF AMERICA,
District of Colorado, ss:

In the District Court, sitting at Denver.

THE UNITED STATES OF AMERICA, *v.* ALEXANDER T. SULLENBERGER, JAMES S. Hatcher, Ellis M. Hampton, Eph. K. Caldwell, Robert E. Sloan, and Eudolphus M. Taylor, defendants.	No. 2029. Motion of defendant Eph. K. Caldwell.

53

Comes the defendant, Eph. K. Caldwell, and moves the court to quash the indictment herein and dismiss this cause against defendant for the following reasons:

(1) The said indictment and the matters therein contained and set forth are not sufficient in law, and he, the said defendant, is not bound by the law of the land to answer the same.

(2) The said indictment is indefinite, uncertain, and insufficient in law in that it does not charge this defendant with having committed any offense against the laws of the United States, and does not state facts sufficient to show that any offense was committed by this defendant.

(3) That said indictment is indefinite, insufficient, and uncertain in law in that it can not be understood or determined from said indictment what lands the defendant is having charged with conspiring to obtain.

(4) That said indictment is indefinite, uncertain, and insufficient in law in that it does not contain any description of, or in any
54 way identify the alleged two thousand nine hundred and ninety (2,990) acres of timber lands which it is alleged defendants conspired to obtain from the United States.

(5) The said indictment is indefinite, uncertain, and insufficient in law in that it describes in that part of the indictment entitled "Overt acts," nineteen different tracts of land, and other parts of the indictment refers to only eighteen of the said tracts, and it is uncertain whether the charge against defendant is that he conspired to obtain for the Pagosa Lumber Company eighteen or nineteen different tracts of land.

(6) The said indictment is indefinite, uncertain, and insufficient in law in that it is therein alleged that the defendants conspired to obtain two thousand nine hundred and ninety (2,990) acres of land, alleged to be thereafter described in that part of the indictment which mentions alleged overt acts one to eighteen, whereas the land described in the paragraphs of the indictment referring to said alleged overt acts one to eighteen only embrace and cover tracts only described as containing two thousand eight hundred and thirty (2,830) acres of land.

(7) The said indictment is indefinite, uncertain, and insufficient in law in that it can not be told from said indictment which particular tracts of land mentioned in the indictment it is claimed the defendant conspired with others to unlawfully obtain for the Pagosa Lumber Company, in that the indictment alleges, first, that
55 the lands sought to be obtained are described in overt acts one to eighteen, and then follows, later in the indictment, charges with reference to nineteen alleged different tracts of land, and then later in the indictment follows an allegation that the defendants conspired to obtain certain of the public lands and property of the United States, without any statement as to whether the conspiracy embraced eighteen tracts or nineteen tracts, wherefore defendant says that he cannot learn from the indictment as to what land he is charged with having conspired to obtain, especially in view of the fact that the first eighteen alleged tracts mentioned in the indictment are not alleged to embrace two thousand nine hundred and ninety acres, and are only alleged, later in the indictment, to embrace two thousand seven hundred and ninety acres, and, also, in view of the fact that even the entire nineteen tracts of land described in the indictment do

not embrace, according to the description given, as much as two thousand nine hundred and ninety acres.

(8) That said indictment is indefinite, uncertain, and insufficient at law in that it is alleged in paragraph 38, as one of the overt acts charged to have been committed, that the defendant, Ellis M. Hampton, furnished to one Mary C. Brown four hundred dollars ($400) for use by said Henry Brown in paying for lands described in overt act numbered nineteen. Said indictment is indefinite and uncer-
56 tain for the reasons that the first statement in the indictment as to the alleged conspiracy does not purport to embrace the lands mentioned in overt act numbered nineteen, whereas they are mentioned in said paragraph 38. Defendant further says it cannot be told from said paragraph 38 whether it was intended by the indictment to allege that the money was paid to said Mary C. Brown or the said Henry Brown.

(9) That said indictment is indefinite, uncertain, and insufficient in that it is not alleged that the said alleged conspiracy embraced the plan of hiring or obtaining the alleged entrymen, or any of them, to make application to purchase lands, or contracting or agreeing with them in advance of their, or any of them, having filed applications to purchase lands, that defendants, or any of them, or the Pagosa Lumber Company, would purchase the lands they would obtain, or would seek to obtain from the United States, nor is there any allegation that the defendants, or any of them, did hire or obtain any person to make application to purchase any lands, or did agree with any person, directly or indirectly, in advance of the said person making his application to purchase, that defendants, or any of them, or the Pagosa Lumber Company, would buy the lands which any such person would make application to purchase, nor is there any alle-
57 gation that the defendants, or any one or more of them, had anything whatsoever to do with the filing of applications to purchase lands made by any one or more of the alleged entrymen, nor is there any allegation that the alleged entrymen at the time they made and filed their applications to purchase lands, made to the United States, or any officer thereof, any false or untrue statement or oath, nor is there any allegation that any entryman, at the time he made and filed his application to purchase, and took and filed, or caused to be filed, the affidavit required to accompany such oath, was other than an honest and bona fide applicant for the purchase of lands.

(10) That said indictment is indefinite, uncertain, and insufficient in that it is not alleged what was contained in the alleged documents called "Testimony of claimant," mentioned in paragraphs one to nineteen, under the heading "Over acts," which it is alleged defendant procured said alleged entrymen to execute and verify.

(11) That said indictment is indefinite and uncertain and insufficient in that it is not alleged that defendant conspired to cause any person to make any false oath, or that any entryman did make any false oath at any time, or that the defendants, or any of them, con-

spired to have any such thing done by any one at any time, or caused, or attempted to cause, any such thing to be done.

(12) That said indictment is insufficient, in that, so far as appears from said indictment, the alleged conspiracy was simply an
58 agreement or plan to furnish to persons, who had already in good faith made applications to purchase timber lands, and had honestly and truthfully, and in good faith, made the affidavits required of them by the statute, the moneys necessary to be paid by them for said lands, and then to have conveyances made by said entrymen and patent obtained therefor.

(13) That said indictment is insufficient in law in that it does not allege that said lands or any of them were mineral lands.

(14) That said indictment is insufficient in law in that it does not allege that any entryman so entering timber lands was not possessed of all the legal requirements required by law of persons seeking to enter timber lands, there being no law making it illegal for a bona fide applicant for the purchase of timber lands, possessed of the required qualifications, after making his application and filing the required oath, to then, in advance of his entry or purchase, make any contract with any one else touching said land.

(15) That said indictment is indefinite, uncertain, and insufficient in law in that it charges this defendant and his codefendants with having conspired, combined, confederated, and agreed together "and with divers other persons to the said grand jury unknown," whereas the said indictment shows on its face that said statement as to said alleged other persons being unknown to the grand jury is not, and was not, true or correct.

59 (16) That said indictment is indefinite, uncertain, and insufficient in law in that it is not alleged how or by what way or method or means the defendant caused or procured the issuance by the United States of the patents, or any one or more of them, mentioned in paragraphs 58 to 68 inclusive, it not being alleged whether anything was done by defendant within three years, or whether the issuance of the said patents was simply the formal act of the Government in pursuance of its approval of entries made more than three years prior thereto.

(17) The said indictment is indefinite, uncertain, and insufficient in law in that the allegations as to lands alleged to have been obtained through one Henry Brown, to wit, the east half of the northwest quarter, and the south half of the northeast quarter of section 23, in township 34 north, range two west, N. M. P. M., are mentioned and described in the paragraph nineteen of the alleged overt acts, do not seem to be connected with the alleged conspiracy, yet charges are made in connection with said land in the paragraphs of alleged overt acts numbered 19, 38, and 57.

(18) That said indictment is indefinite, uncertain, and insufficient at law in that paragraph 12 of the alleged overt acts a tract of land is mentioned as containing one hundred and sixty (160) acres,

when the description furnished in the same paragraph shows only one hundred and twenty (120) acres.

60 (19) The said indictment is indefinite, uncertain, and insufficient at law in that there is attempted to be described in paragraph 7 of the alleged overt acts a tract of land lying in one body, which is stated to be the northeast quarter of the southeast quarter of section 35, the southeast quarter of the southeast quarter of section 26, and the west half of the southwest quarter of section 25, in township 36 north, and range two and one-half west, reference being had to the New Mexico principal meridian, containing one hundred and sixty (160) acres; whereas, as appears, from said indictment, no such body of land could possibly exist, and the description is an impossible description, and one which describes no body of land which ever did or ever could exist.

(20) That said indictment is indefinite, uncertain, and insufficient at law in that there is attempted to be described in paragraph 4 of the alleged overt acts an alleged tract of land, but said description is so uncertain and indefinite that it cannot be told what tract of land is intended to be described.

(21) That said indictment is indefinite, uncertain, and insufficient at law in that there is attempted to be described in paragraph 16 of the alleged overt acts an alleged tract of land of one hundred and sixty (160) acres, which description is an impossible description, and does not identify and could not identify any tract of land.

61 (22) That said indictment is indefinite, uncertain, and insufficient at law in that it is alleged in paragraph 56 of the alleged overt acts of the defendants, at Pagosa Springs, in the District of Colorado, required one Mary C. Brown to execute a certain deed therein mentioned.

(23) That said indictment is indefinite, uncertain, and insufficient at law in that it is alleged in paragraph 44 of the alleged overt acts that defendants required one of the alleged entrymen to execute a deed to the Hatcher Mercantile Company, and it is not alleged that said alleged grantee took the title thereto in trust for the Pagosa Lumber Company, or held it in trust or for the benefit of said company, or that there was any intention to have said land so held, nor is there any statement as to in what way the said Pagosa Lumber Company did or could profit by said conveyance.

(24) That said indictment is insufficient in law in that it does not allege that the alleged conspiracy therein mentioned or attempted to be set forth was formed within three years before the return or filing of the said indictment.

(25) That said indictment is insufficient in law in that it shows upon its face that the alleged conspiracy was formed more than three years before the return or filing of said indictment, which was on the 6th day of June, 1901, and that overt acts mentioned

62 in paragraphs numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 20, 21, 22, 23, 24, 25, 26, 27, 28, 39, 40, 41, 42, 43, 44, 45, 46, and 47 are alleged to have been committed under and in pursuance of said conspiracy

more than three years before the return of said indictment, all of said alleged overt acts being alleged to have been committed in the said year 1901.

(26) That said indictment shows on its face that the said prosecution against defendant, and said alleged offense, is barred by the statute of limitations of three years, in such cases made and provided.

(27) That said indictment is indefinite, uncertain, and insufficient at law in that it makes no charge or allegation that any unlawful conspiracy was formed at any time within three years prior to the return or filing of said indictment, but simply alleges that a conspiracy was formed and overt acts committed at times more than three years prior to the return of said indictment, and that at times within said period of three years the defendants did certain other overt acts.

(28) That said indictment is uncertain, indefinite, and insufficient in law in that there is no date fixed or stated or alleged in the said indictment within three years before the filing or return of the indictment, on which the alleged conspiracy was formed.

63 (29) That said indictment is uncertain, indefinite, and insufficient in law as to the date of the formation of the alleged conspiracy in that it is simply alleged in general terms that the conspiracy has been a continuing conspiracy at all times since June 6th, 1901.

(30) That said indictment is insufficient in law in that it does not allege the existence of the alleged conspiracy at any particular time, or times, within three years from the return thereof, and does not allege the conscious participation of the defendant therein within said three years.

(31) That said indictment is insufficient in law in that, while it alleges overt acts within three years of the return of the said indictment, it does not allege that within said three years defendant gave his consent or agreement to the continued existence and execution of said conspiracy.

(32) That said indictment in insufficient in law in that it does not state the names of the parties who formed a conspiracy within three years next before the return of said indictment, nor does it state, or attempt to state, the names of the persons who were connected with said conspiracy within said period of three years, nor does it state that the names of the persons, or any of the persons who formed the said alleged conspiracy within three years or who were connected with it were, to the grand jury, unknown,

64 but simply says that the conspiracy as formed on June 6th, 1901, by defendants with other persons to the grand jury unknown, and continued until the return of said indictment.

(33) That said indictment is insufficient in law in that it does not allege what the conspiracy, charged to exist within three years next prior to the return of said indictment, consisted of or was, or the means or method that was, or were, to be adopted to carry out the

same, save and except by reference to an alleged conspiracy said to have existed more than three years prior to the return of said indictment, and which alleged offense was and is barred by the statute of limitations of three years.

(34) That said indictment is indefinite, uncertain, and insufficient in charging any offense to have been committed within three years before the filing of said indictment in that the said indictment shows on its face that the alleged plan of the alleged conspirators, by which said alleged conspiracy was to be carried out, could not have been adopted within said period of three years, because said indictment alleges that, as to large numbers of the tracts of land mentioned in the said indictment, the things alleged to have been planned had been carried out more than three years before the return of said indictment, and therefore could not have been a part of any plan or conspiracy adopted within said period of three years.

65 (35) That said indictment is indefinite, uncertain, and insufficient in law in that it is not alleged that defendants, or any of them, at any place within the District of Colorado, conspired, confederated, or agreed to do anything whatever within the period of three years next before the return of said indictment, there being no allegation whatever as to the place of the conspiracy, or the agreement to cooperate, or of any acquiescence in said conspiracy in said period of three years, and, so far as appears from said indictment, no one of the defendants may have been in the District of Colorado within said period of three years.

(36) That said indictment is insufficient in law and void for duplicity in that it charges against defendant the formation of an unlawful conspiracy, on, to wit, June 6th, 1901, and the doing of overt acts mentioned in paragraphs numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 20, 21, 22, 23, 24, 25, 26, 27, 28, 39, 40, 41, 42, 43, 44, 45, 46, and 47, and also charges the defendant in the same count with the crime of conspiracy committed at a time within three years next prior to June 22, 1907, and the doing thereunder of overt acts mentioned in paragraphs 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, and 68, thereby embracing in one count two charges, or offenses,

66 of conspiracy, and overt acts under each charge.

(37) The defendant, in support of and as a part of his motion to dismiss the cause and quash the indictment, because the indictment was not found or returned within three years next after the alleged offense was committed, and in support of his claim that the prosecution against defendant is barred by the statute of limitations, further says: That during all of the times mentioned in the indictment, and at the time first mentioned, to wit, June 6th, 1901, and ever since that time, the defendant has been a citizen and resident of the State of Colorado, and has, during said entire period of time, resided and lived and actually been in the State of Colorado, and he has never been a fugitive from justice in any way, nor has he ever, at any time, fled from justice, and that his whereabouts in the State

of Colorado have never been concealed and were well known to the people of the State of Colorado and the prosecuting officers of the United States Government. And defendant further says that he has never, at any time, left the district for the purpose of avoiding arrest, and he could have been easily apprehended or arrested had any indictment been found against him at any time since said 6th day of June, 1901. He further states that no information or criminal complaint of any kind was filed against him, and that he was not arrested until after the return of the indictment in this cause, which was returned on the 22nd day of June, 1907.

67 (38) That the indictment should be quashed for the further reason, as defendant alleges the facts to be, that the grand jurors by whom said indictment was made or presented were not regularly or legally summoned, empaneled, and sworn, as required by the laws of the United States governing such procedure, in this, to wit: At the May term of this court on the day of , 1907, a grand jury was ordered to be summoned from certain counties named in the order, and the clerk of this court, in the presence of the marshal of this court, was ordered to draw by chance from the jury box the names of twenty-three persons, residents of the counties of Colorado, named in said order, and to summon them to appear on Tuesday, the 14th day of May, 1907, at 10 o'clock a. m., under a venire facias made returnable on that day. Thereupon the names of twenty-three persons were drawn by the clerk, such names being fully set forth in the records of this court, at page 350.

Thereafter, and on the 14th day of May, 1907, the United States marshal of the District of Colorado made return of the venire facias aforesaid, showing that thereunder he had summoned twenty-one men to serve as grand jurors. That the twenty-one individuals so summoned appeared on the return day aforesaid, and, for good and sufficient reasons to the court appearing, seven of said number were excused further attendance upon the court at that term, leaving less than sixteen, to wit, fourteen, of the individuals originally

68 summoned. Thereafter, upon these facts appearing to the court, a special venire facias was issued on said day, commanding the marshal to summon seven good and lawful men to attend and serve as grand jurors until discharged, which said venire facias was made returnable on the 14th day of May, at two o'clock p. m. That thereafter the marshal of this court, under said special venire facias, without drawing further names from the box, summoned from the city and county of Denver seven men, whose names appear at page 415 of the records of this court. That the summoning of said seven individuals under the special venire facias was contrary to law and the rules of this court. That the seven individuals so summoned appeared, were duly sworn and empaneled with the fourteen of the original panel, and the twenty-one individuals so summoned, impaneled, and sworn constituted the grand jury which returned the indictment herein.

FRANK C. GOUDY AND L. F. TWITCHELL,
Attorneys for defendant.

STATE OF COLORADO,
County of Archuleta, ss:

Ephraim K. Caldwell, being first duly sworn, upon oath deposes: That he is the defendant above named. That he has heard read the foregoing motion, and that the statements of facts therein made and contained are true of his own knowledge.

69 EPHRAIM K. CALDWELL.

Subscribed and sworn to before me this the fifteenth day of November, 1907.

My commission expires
[SEAL.]

M. O. LONGWORTHY,
Clerk of the District Court.

(Endorsed:) No. 2029. United States of America, District of Colorado, ss. In the District Court, sitting at Denver. The United States of America versus Alexander T. Sullenberger, James S. Hatcher, Ellis M. Hampton, Eph. K. Caldwell, Robert E. Sloan, and Eudolphus M. Taylor, defendants. Motion of defendant Eph. K. Caldwell to quash indictment, &c. Filed Nov. 20, 1907, Charles W. Bishop, clerk. Goudy & Twitchell.

UNITED STATES OF AMERICA,
District of Columbia, ss:

In the District Court, sitting at Denver.

THE UNITED STATES OF AMERICA *v.* ALEXANDER T. SULLENBERGER, JAMES S. Hatcher, Ellis M. Hampton, Eph. K. Caldwell, Robert E. Sloan, and Eudolphus M. Taylor, defendants.	No. 2029. Motion of defendant Ellis M. Hampton.

70

Comes the defendant, Ellis M. Hampton, and moves the court to quash the indictment herein, and dismiss this cause against defendant, for the following reasons:

(1) The said indictment and the matters therein contained and set forth are not sufficient in law, and he, the said defendant, is not bound by the law of the land to answer the same.

(2) The said indictment is indefinite, uncertain, and insufficient in law in that it does not charge this defendant with having committed any offense against the laws of the United States, and does not state facts sufficient to show that any offense was committed by this defendant.

(3) That said indictment is indefinite, insufficient, and uncertain in law in that it cannot be understood or determined from said indict-

ment what lands the defendant is having charged with conspiring to obtain.

(4) That said indictment is indefinite, uncertain, and insufficient in law in that it does not contain any description of, or in any
71 way identify the alleged two thousand nine hundred and ninety (2,990) acres of timber lands which it is alleged defendants conspired to obtain from the United States.

(5) The said indictment is indefinite, uncertain, and insufficient in law in that it describes in that part of the indictment entitled "overt acts," nineteen different tracts of land, and in other parts of the indictment refers to only eighteen of the said tracts, and it is uncertain whether the charge against defendant is that he conspired to obtain for the Pagosa Lumber Company eighteen or nineteen different tracts of land.

(6) The said indictment is indefinite, uncertain, and insufficient in law in that it is therein alleged that the defendants conspired to obtain two thousand nine hundred and ninety (2,990) acres of land, alleged to be thereafter described in that part of the indictment which mentions alleged overt acts one to eighteen, whereas the land described in the paragraphs of the indictment referring to said alleged overt acts one to eighteen only embrace and cover tracts only described as containing two thousand eight hundred and thirty (2,830) acres of land.

(7) The said indictment is indefinite, uncertain, and insufficient in law in that it cannot be told from said indictment which particular tracts of land mentioned in the indictment it is claimed the defendant conspired with others to unlawfully obtain for the Pagosa
72 Lumber Company, in that the indictment alleges, first, that the lands sought to be obtained are described in overt acts one to eighteen, and then follows, later in the indictment, charges with reference to nineteen alleged different tracts of land, and then later in the indictment follows an allegation that the defendants conspired to obtain certain of the public lands and property of the United States, without any statement as to whether the conspiracy embraced eighteen tracts or nineteen tracts, wherefore defendant says that he cannot learn from the indictment as to what land he is charged with having conspired to obtain, especially in view of the fact that the first eighteen alleged tracts mentioned in the indictment are not alleged to embrace two thousand nine hundred and ninety acres, and are only alleged, later in the indictment, to embrace two thousand, seven hundred and ninety acres, and, also, in view of the fact that even the entire nineteen tracts of land described in the indictment do not embrace, according to the description given, as much as two thousand nine hundred and ninety acres.

(8) That said indictment is indefinite, uncertain, and insufficient in law in that it is alleged in paragraph 38, as one of the overt acts charged to have been committed, that the defendant Ellis M. Hampton furnished to one Mary C. Brown four hundred dollars ($400) for use by said Henry Brown in paying for lands described in overt

act numbered nineteen. Said indictment is indefinite and
73 uncertain for the reasons that the first statement in the indictment as to the alleged conspiracy does not purport to embrace the lands mentioned in overt act numbered nineteen, whereas they are mentioned in said paragraph 38. Defendant further says it can not be told from said paragraph 38 whether it was intended by the indictment to allege that the money was paid to said Mary C. Brown or the said Henry Brown.

(9) That said indictment is indefinite, uncertain, and insufficient in that it is not alleged that the said alleged conspiracy embraced the plan of hiring or obtaining the alleged entrymen, or any of them, to make application to purchase lands, or contracting or agreeing with them in advance of their, or any of them, having filed applications to purchase lands, that defendants, or any of them, or the Pagosa Lumber Company, would purchase the lands they would obtain, or would seek to obtain from the United States, nor is there any allegation that the defendants, or any of them, did hire or obtain any person to make application to purchase any lands, or did agree with any person, directly or indirectly, in advance of the said person making his application to purchase, that defendants, or any of them, or the Pagosa Lumber Company, would buy the lands which any such person would make application to purchase, nor is there any
74 allegation that the defendants, or any one or more of them, had anything whatsoever to do with the filing of applications to purchase lands made by any one or more of the alleged entrymen, nor is there any allegation that the alleged entrymen at the time they made and filed their applications to purchase lands, made to the United States, or any officer thereof, any false or untrue statement or oath, nor is there any allegation that any entryman, at the time he made and filed his application to purchase, and took and filed, or caused to be filed, the affidavit required to accompany such oath, was other than an honest and bona fide applicant for the purchase of lands.

(10) That said indictment is indefinite, uncertain, and insufficient in that it is not alleged what was contained in the alleged documents called "testimony of claimant," mentioned in paragraphs one to nineteen, under the heading "Overt acts," which it is alleged defendant procured said alleged entrymen to execute and verify.

(11) That said indictment is indefinite and uncertain and insufficient in that it is not alleged that defendant conspired to cause any person to make any false oath, or that any entryman did make any false oath at any time, or that the defendants, or any of them, conspired to have any such thing done by any one at any time, or caused, or attempted to cause, any such thing to do done.

(12) That said indictment is insufficient in that, so far as appears from said indictment, the alleged conspiracy was simply an
75 agreement or plan to furnish to persons, who had already in good faith made applications to purchase timber lands, and had honestly and truthfully, and in good faith, made the affidavits

required of them by the statute, the moneys necessary to be paid by them for said lands, and then to have conveyances made by said entrymen and patent obtained therefor.

(13) That said indictment is insufficient in law in that it does not allege that said lands or any of them were mineral lands.

(14) That said indictment is insufficient in law in that it does not allege that any entryman so entering timber lands was not possessed of all the legal requirements required by law of persons seeking to enter timber lands, there being no law making it illegal for a bona fide applicant for the purchase of timber lands, possessed of the required qualifications, after making his application and filing the required oath, to then, in advance of his entry or purchase, make any contract with any one else touching said land.

(15) That said indictment is indefinite, uncertain, and insufficient in law in that it charges this defendant and his codefendants with having conspired, combined, confederated, and agreed together " and with divers other persons to the said grand jury unknown," whereas the said indictment shows on its face that said statement as to said alleged other persons being unknown to the grand jury is not, and was not, true or correct.

76 (16) That said indictment is indefinite, uncertain, and insufficient in law in that it is not alleged how or by what way or method or means the defendant caused or procured the issuance by the United States of the patents, or any one or more of them, mentioned in paragraphs 58 to 68 inclusive, it not being alleged whether anything was done by defendant within three years, or whether the issuance of the said patents was simply the formal act of the Government in pursuance of its approval of entries made more than three years prior thereto.

(17) The said indictment is indefinite, uncertain, and insufficient in law in that the allegations as to lands alleged to have been obtained through one Henry Brown, to wit, the east half of the northwest quarter, and the south half of the northeast quarter of section 23, in township 34, north, range two west, N. M. P. M, are mentioned and described in the paragraph nineteen of the alleged overt acts, do not seem to be connected with the alleged conspiracy, yet charges are made in connection with said land in the paragraphs of alleged overt acts numbered 19, 38, and 57.

(18) That said indictment is indefinite, uncertain and insufficient at law, in that paragraph 12 of the alleged overt acts, a tract of land is mentioned as containing one hundred and sixty (160) acres, when the description furnished in the same paragraph shows only one hundred and twenty (120) acres.

77 (19) The said indictment is indefinite, uncertain and insufficient at law in that there is attempted to be described in paragraph 7 of the alleged overt acts, a tract of land lying in one body, which is stated to be the northeast quarter of the southeast quarter of section 35, the southeast quarter of the southeast quarter of section 26, and the west half of the southwest quarter of section

25, in township 36, north and range two and one-half west, reference being had to the New Mexico principal meridian, containing one hundred and sixty (160) acres; whereas, as appears from said indictment, no such body of land could possibly exist, and the description is an impossible description, and one which described no body of land which ever did or ever could exist.

(20) That said indictment is indefinite, uncertain, and insufficient at law, in that there is attempted to be described in paragraph 4 of the alleged overt acts, an alleged tract of land, but said description is so uncertain and indefinite that it cannot be told what tract of land is intended to be described.

(21) That said indictment is indefinite, uncertain, and insufficient at law in that there is attempted to be described in paragraph 16 of the alleged overt acts, an alleged tract of land of one hundred and sixty (160) acres, which description is an impossible description, and does not identify and could not identify any tract of land.

78 (22) That said indictment is indefinite, uncertain, and insufficient at law in that it is alleged in paragraph 56 of the alleged overt acts that defendants, at Pagosa Springs, in the District of Columbia, required one Mary C. Brown to execute a certain deed therein mentioned.

(23) That said indictment is indefinite, uncertain, and insufficient at law in that it is alleged in paragraph 44 of the alleged overt acts that defendants required one of the alleged entrymen to execute a deed to the Hatcher Mercantile Company, and it is not alleged that said alleged grantee took the title thereto in trust for the Pagosa Lumber Company, or held it in trust or for the benefit of said company, or that there was any intention to have said land so held, nor is there any statement as to in what way the said Pagosa Lumber Company did or could profit by said conveyance.

(24) That said indictment is insufficient in law in that it does not allege that the alleged conspiracy therein mentioned or attempted to be set forth was formed within three years before the return or filing of the said indictment.

(25) That said indictment is insufficient in law in that it shows upon its face that the alleged conspiracy was formed more than three years before the return or filing of said indictment, which

79 was on the 6th day of June, 1901, and that overt acts mentioned in paragraphs numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 20, 21, 22, 23, 24, 25, 26, 27, 28, 39, 40, 41, 42, 43, 44, 45, 46, and 47, are alleged to have been committed under and in pursuance of said conspiracy more than three years before the return of said indictment, all of said alleged overt acts being alleged to have been committed in the said year 1901.

(26) That said indictment shows on its face that the said prosecution against defendant, and said alleged offense, is barred by the statute of limitations of three years, in such cases made and provided.

(27) That said indictment is indefinite, uncertain, and insufficient at law in that it makes no charge or allegation that any unlawful

conspiracy was formed at any time within three years prior to the return or filing of said indictment, but simply alleges that a conspiracy was formed and overt acts committed at times more than three years prior to the return of said indictment, and that at times within said period of three years the defendants did certain other overt acts.

(28) That said indictment is uncertain, indefinite, and insufficient in law in that there is no date fixed or stated or alleged in the said indictment within three years before the filing or return of the indictment on which the alleged conspiracy was formed.

80 (29) That said indictment is uncertain, indefinite, and insufficient in law as to the date of the formation of the alleged conspiracy in that it is simply alleged in general terms that the conspiracy has been a continuing conspiracy at all times since June 6th, 1901.

(30) That said indictment is insufficient in law in that it does not allege the existence of the alleged conspiracy at any particular time or times within three years from the return thereof and does not allege the conscious participation of the defendant therein within said three years.

(31) That said indictment is insufficient in law in that, while it alleges overt acts within three years of the return of the said indictment, it does not allege that within said three years defendant gave his consent or agreement to the continued existence and execution of said conspiracy.

(32) That said indictment is insufficient in law in that it does not state the names of the parties who formed a conspiracy within three years next before the return of said indictment, nor does it state, or attempt to state, the names of the persons who were connected with said conspiracy within said period of three years, nor does it state that the names of the persons, or any of the persons who formed the said alleged conspiracy within three years or who were con-

81 nected with it, were to the grand jury unknown, but simply says that the conspiracy was formed on June 6th, 1901, by defendants, with other persons to the grand jury unknown, and continued until the return of said indictment.

(33) That said indictment is insufficient in law in that it does not allege what the conspiracy, charged to exist within three years next prior to the return of said indictment, consisted of or was, or the means or method that was, or were, to be adopted to carry out the same, save and except by reference to an alleged conspiracy said to have existed more than three years prior to the return of said indictment, and which alleged offense was and is barred by the statute of limitations of three years.

(34) That said indictment is indefinite, uncertain, and insufficient in charging any offense to have been committed within three years before the filing of said indictment in that the said indictment shows on its face that the alleged plan of the alleged conspirators by which

said alleged conspiracy was to be carried out could not have been adopted within said period of three years, because said indictment alleges that, as to large numbers of the tracts of land mentioned in the said indictment, the things alleged to have been planned had been carried out more than three years before the return of said indictment, and therefore could not have been a part of any plan or conspiracy adopted within said period of three years.

82 (35) That said indictment is indefinite, uncertain, and insufficient in law in that it is not alleged that defendants, or any of them, at any place within the District of Colorado, conspired, confederated, or agreed to do anything whatever within the period of three years next before the return of said indictment, there being no allegation whatever as to the place of the conspiracy, or the agreement to cooperate, or of any acquiescence in said conspiracy in said period of three years, and, so far as appears from said indictment, no one of the defendants may have been in the District of Colorado within said period of three years.

(36) That said indictment is insufficient in law and void for duplicity in that it charges against defendant the formation of an unlawful conspiracy, on, to wit, June 6th, 1901, and the doing of overt acts mentioned in paragraphs numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 20, 21, 22, 23, 24, 25, 26, 27, 28, 39, 40, 41, 42, 43, 44, 45, 46, and 47, and also charges the defendant in the same count with the crime of conspiracy committed at a time within three years next prior to June 22, 1907, and the doing thereunder of overt acts mentioned in paragraphs 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, and 68, thereby embracing in one count two charges, or

83 offenses, of conspiracy, and overt acts under each charge.

(37) The defendant, in support of, and as a part of, his motion to dismiss the cause and quash the indictment, because the indictment was not found or returned within three years next after the alleged offense was committed, and in support of his claim that the prosecution against defendant is barred by the statute of limitations, further says: That during all of the times mentioned in the indictment, and at the time first mentioned, to wit, June 6th, 1901, and ever since that time, the defendant has been a citizen and resident of the State of Colorado, and has, during said entire period of time, resided and lived and actually been in the State of Colorado, and he has never been a fugitive from justice in any way nor has he ever, at any time, fled from justice, and that his whereabouts in the State of Colorado have never been concealed, and were well known to the people of the State of Colorado, and the prosecuting officers of the United States Government. And defendant further says that he has never, at any time, left the district for the purpose of avoiding arrest, and he could have been easily apprehended or arrested had any indictment been found against him at any time since said 6th day of June, 1901. He further states that no information or criminal com-

plaint of any kind was filed against him, and that he was not arrested until after the return of the indictment in this cause, which was returned on the 22nd day of June, 1907.

84 (38) That the indictment should be quashed for the further reason, as defendant alleges the facts to be, that the grand jurors by whom said indictment was made or presented were not regularly or legally summoned, empaneled, and sworn, as required by the laws of the United States governing such procedure, in this, to wit: At the May term of this court on the day of , 1907, a grand jury was ordered to be summoned from certain counties named in the order, and the clerk of this court, in the presence of the marshal of this court, was ordered to draw by chance from the jury box the names of twenty-three persons, residents of the counties of Colorado, named in said order, and to summon them to appear on Tuesday, the 14th day of May, 1907, at ten o'clock a. m., under a venire facias made returnable on that day. Thereupon the names of twenty-three persons were drawn by the clerk, such names being fully set forth in the records of this court, at page 350.

Thereafter, and on the 14th day of May, 1907, the United States marshal of the District of Colorado, made return of the venire facias aforesaid, showing that thereunder he had summoned twenty-one men to serve as grand jurors. That the twenty-one individuals so summoned appeared on the return day aforesaid, and for good and sufficient reasons to the court appearing, seven of said number were excused further attendance upon the court at that term, leaving less than sixteen, to wit, fourteen, of the individuals originally

85 summoned. Thereafter, upon these facts appearing to the court, a special venire facias was issued on said day, commanding the marshal to summon seven good and lawful men to attend and serve as grand jurors until discharged, which said venire facias was made returnable on the 14th day of May, at two o'clock p. m. That thereafter, the marshal of this court, under special venire facias, without drawing further names from the box, summoned from the city and county of Denver, seven men, whose names appear at page 415 of the records of this court. That the summoning of said seven individuals under the special venire facias was contrary to law and the rules of this court. That the seven individuals so summoned appeared, were duly sworn and empaneled with the fourteen of the original panel, and the twenty-one individuals so summoned, impaneled, and sworn constituted the grand jury which returned the indictment herein.

FRANK C. GOUDY AND L. F. TWITCHELL,
Attorneys for Defendant.

STATE OF COLORADO,
County of Archuleta, ss:

Ellis M. Hampton, being first duly sworn, upon oath deposes: That he is the defendant above named. That he has heard read the fore-

going motion, and that the statements of facts therein made and contained are true of his own knowledge.

86 ELLIS M. HAMPTON.

Subscribed and sworn to before me this the 16th day of November, 1907.

[SEAL.] M. O. LANGWORTHY.
Clerk of the District Court in and for said Archuleta County, Colo.

(Endorsed:) No. 2029. United States of America, District of Colorado, ss. In the District Court, sitting at Denver. The United States of America versus Alexander T. Sullenberger, James S. Hatcher, Ellis M. Hampton, Eph. K. Caldwell, Robert E. Sloan, and Eudolphus M. Taylor, defendants. Motion of defendant, Ellis M. Hampton, to quash indictment, &c. Filed Nov. 20, 1907, Charles W. Bishop, clerk. Goudy & Twitchell.

UNITED STATES OF AMERICA,
District of Colorado, ss:

In the District Court, sitting at Denver.

THE UNITED STATES OF AMERICA *vs.* ALEXANDER T. SULLENBERGER, JAMES S. Hatcher, Ellis M. Hampton, Eph. K. Caldwell, Robert E. Sloan, and Eudolphus M. Taylor, defendants.	No. 2029. Motion of defendant, Eudolphus M. Taylor.

Comes the defendant, Eudolphus M. Taylor, and moves the
87 court to quash the indictment herein and dismiss this cause against defendant, for the following reasons:

(1) The said indictment and the matters therein contained and set forth are not sufficient in law, and he, the said defendant, is not bound by the law of the land to answer the same.

(2) The said indictment is indefinite, uncertain, and insufficient in law in that it does not charge this defendant with having committed any offense against the laws of the United States and does not state facts sufficient to show that any offense was committed by this defendant.

(3) That said indictment is indefinite, insufficient, and uncertain in law in that it can not be understood or determined from said indictment what lands the defendant is having charged with conspiring to obtain.

(4) That said indictment is indefinite, uncertain, and insufficient in law in that it does not contain any description of, or in any way identify the alleged two thousand nine hundred and ninty (2,990) acres of timber lands which it is alleged defendants conspired to obtain from the United States.

(5) That said indictment is indefinite, uncertain, and insufficient in law in that it described in that part of the indictment entitled "Overt acts," nineteen different tracts of land, and in other
88 parts of the indictment refers to only eighteen of the said tracts, and it is uncertain whether the charge against defendant is that he conspired to obtain for the Pagosa Lumber Company eighteen or nineteen different tracts of land.

(6) The said indictment is indefinite, uncertain, and insufficient in law in that it is therein alleged that the defendants conspired to obtain two thousand nine hundred and ninety (2,990) acres of land, alleged to be thereafter described in that part of the indictment which mentions alleged overt acts one to eighteen, whereas the land described in the paragraphs of the indictment referring to said alleged overt acts one to eighteen only embrace and cover tracts only described as containing two thousand eight hundred and thirty (2,830) acres of land.

(7) The said indictment is indefinite, uncertain, and insufficient in law in that it cannot be told from said indictment which particular tracts of land mentioned in the indictment it is claimed the defendant conspired with others to unlawfully obtain for the Pagosa Lumber Company, in that the indictment alleges, first, that the lands sought to be obtained are described in overt acts one to eighteen, and then follows, later in the indictment, charges with reference to nineteen alleged different tracts of land, and then later in the indictment follows an allegation that the defendants conspired to obtain
89 certain of the public lands and property of the United States, without any statement as to whether the conspiracy embraced eighteen tracts or nineteen tracts, wherefore defendant says that he cannot learn from the indictment as to what land he is charged with having conspired to obtain, especially in view of the fact that the first eighteen alleged tracts mentioned in the indictment are not alleged to embrace two thousand nine hundred and ninety acres, and are only alleged, later in the indictment, to embrace two thousand seven hundred and ninety acres, and, also, in view of the fact that even the entire nineteen tracts of land described in the indictment do not embrace according to the description given, as much as two thousand nine hundred and ninety acres.

(8) That said indictment is indefinite, uncertain, and insufficient at law in that it is alleged in paragraph 38 as one of the overt acts charged to have been committed that the defendant, Ellis M. Hampton, furnished to one Mary C. Brown four hundred dollars ($400) for use by said Henry Brown in paying for lands described in overt act numbered nineteen. Said indictment is indefinite and uncertain for the reasons that the first statement in the indictment as to the alleged conspiracy does not purport to embrace the lands mentioned in overt act numbered nineteen, whereas they are mentioned in
90 said paragraph 38. Defendant further says it cannot be told from said paragraph 38 whether it was intended by the in-

dictment to allege that the money was paid to said Mary C. Brown or the said Henry Brown.

(9) That said indictment is indefinite, uncertain, and insufficient in that it is not alleged that the said alleged conspiracy embraced the plan of hiring or obtaining the alleged entrymen, or any of them, to make application to purchase lands, or contracting or agreeing with them in advance of their, or any of them, having filed applications to purchase lands, that defendants, or any of them, or the Pagosa Lumber Company, would purchase the lands they would obtain, or would seek to obtain from the United States, nor is there any allegation that the defendants, or any of them, did hire or obtain any person, to make application to purchase any lands, or did agree with any person directly or indirectly, in advance of the said person making his application to purchase, that defendants or any of them, or the Pagosa Lumber Company, would buy the lands which any such person would make application to purchase, nor is there any allegation that the defendants, or any one or more of them had anything whatsoever to do with the filing of applications to purchase lands made by any one or more of the alleged entrymen, nor is there any allegation that the alleged entrymen at the time they made
91 and filed their applications to purchase lands, made to the United States, or any officer thereof, any false or untrue statement or oath, nor is there any allegation that any entryman at the time he made and filed his application to purchase, and took and filed or caused to be filed the affidavit required to accompany such oath, was other than an honest and bona fide applicant for the purchase of lands.

(10) That said indictment is indefinite, uncertain, and insufficient in that it is not alleged what was contained in the alleged documents called "testimony of claimant," mentioned in paragraphs one to nineteen, under the leading "Overt Acts," which it is alleged defendant procured said alleged entrymen to execute and verify.

(11) That said indictment is indefinite and uncertain and insufficient, in that it is not alleged that defendant conspired to cause any person to make any false oath, or that any entryman did make any false oath at any time, or that the defendants, or any of them conspired to have any such thing done by any one at any time, or caused, or attempted to cause, any such thing to be done.

(12) That said indictment is insufficient in that, so far as appears from said indictment, the alleged conspiracy was simply an
92 agreement or plan to furnish to persons, who had already in good faith made applications to purchase timber lands, and had honestly and truthfully, and in good faith, made the affidavits required of them by the statute, the moneys necessary to be paid by them for said lands, and then to have conveyances made by said entrymen and patent obtained therefor.

(13) That said indictment is insufficient in law, in that it does not allege that said lands or any of them were mineral lands.

(14) That said indictment is insufficient in law, in that it does not allege that any entryman, so entering timber lands, was not possessed of all the legal requirements required by law of persons seeking to enter timber lands, there being no law making it illegal for a bona fide applicant for the purchase of timber lands, possessed of the required qualifications, after making his application and filing the required oath, to then, in advance of his entry or purchase, make any contract with any one else touching said land.

(15) That said indictment is indefinite, uncertain, and insufficient in law in that it charges this defendant and his codefendants with having conspired, combined, confederated, and agreed together "and with divers other persons to the said grand jury unknown,"
93 whereas the said indictment shows on its face that said statement as to said alleged other persons being unknown to the grand jury is not, and was not, true or correct.

(16) That said indictment is indefinite, uncertain, and insufficient in law in that it is not alleged how or by what way or method or means the defendant caused or procured the issuance by the United States of the patents, or any one or more of them, mentioned in paragraphs 58 to 68 inclusive, it not being alleged whether anything was done by defendant within three years, or whether the issuance of the said patents was simply the formal act of the Government in pursuance of its approval of entries made more than three years prior thereto.

(17) The said indictment is indefinite, uncertain, and insufficient in law in that the allegations as to lands alleged to have been obtained through one Henry Brown, to wit, the east half of the northwest quarter, and the south half of the northeast quarter of section 23, in township 34 north, range two west, N. M. P. M., are mentioned and described in the paragraph nineteen of the alleged overt acts, do not seem to be connected with the alleged conspiracy, yet charges are made in connection with said land in the paragraphs of alleged overt acts numbered 19, 38, and 57.

(18) That said indictment is indefinite, uncertain, and in-
94 sufficient at law, in that paragraph 12 of the alleged overt acts, a tract of land is mentioned as containing one hundred and sixty (160) acres, when the description furnished in the same paragraph shows only one hundred and twenty (120) acres.

(19) That said indictment is indefinite, uncertain, and insufficient at law in that there is attempted to be described in paragraph 7 of the alleged overt acts a tract of land lying in one body, which is stated to be the northeast quarter of the southeast quarter of section 35, the southeast quarter of the southeast quarter of section 26, and the west half of the southwest quarter of section 25, in township 36 north and range two and one-half west, reference being had to the New Mexico principal meridian, containing one hundred and sixty (160) acres; whereas, as appears from said indictment, no such body of land could possibly exist, and the description is an impossible description, and

one which describes no body of land which ever did or ever could exist.

(20) That said indictment is indefinite, uncertain, and insufficient at law in that there is attempted to be described in paragraph 4 of the alleged overt acts an alleged tract of land, but said description is so uncertain and indefinite that it cannot be told what tract of land is intended to be described.

(21) That said indictment is indefinite, uncertain, and insufficient at law in that there is attempted to be described in paragraph
95 16 of the alleged overt acts an alleged tract of land of one hundred and sixty (160) acres, which description is an impossible description, and does not identify and could not identify any tract of land.

(22) That said indictment is indefinite, uncertain, and insufficient at law in that it is alleged in paragraph 56 of the alleged overt acts that defendants, at Pagosa Springs, in the District of Colorado, required one Mary C. Brown to execute a certain deed therein mentioned.

(23) That said indictment is indefinite, uncertain, and insufficient at law in that it is alleged in paragraph 44 of the alleged overt acts that defendants required one of the alleged entrymen to execute a deed to the Hatcher Mercantile Company, and it is not alleged that said alleged grantee took the title thereto in trust for the Pagosa Lumber Company, or held it in trust or for the benefit of said company, or that there was any intention to have said land so held, nor is there any statement as to in what way the said Pagosa Lumber Company did or could profit by said conveyance.

(24) That said indictment is insufficient in law in that it does not allege that the alleged conspiracy therein mentioned, or attempted to be set forth, was formed within three years before the return or filing of the said indictment.

96 (25) That said indictment is insufficient in law in that it shows upon its face that the alleged conspiracy was formed more than three years before the return or filing of said indictment, which was on the 6th day of June, 1901, and that overt acts mentioned in paragraphs numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 20, 21, 22, 23, 24, 25, 26, 27, 28, 39, 40, 41, 42, 43, 44, 45, 46, and 47 are alleged to have been committed under and in pursuance of said conspiracy more than three years before the return of said indictment, all of said alleged overt acts being alleged to have been committed in the said year 1901.

(26) That said indictment shows on its face that the said prosecution against defendant, and said alleged offense, is barred by the statute of limitations of three years, in such cases made and provided.

(27) That said indictment is indefinite, uncertain, and insufficient in law in that it makes no charge or allegation that any unlawful conspiracy was formed at any time within three years prior to the return or filing of said indictment, but simply alleges that a conspiracy was formed, and overt acts committed, at times more than

three years prior to the return of said indictment, and that at times within said period of three years the defendants did certain other overt acts.

97 (28) That said indictment is uncertain, indefinite, and insufficient in law in that there is no date fixed or stated or alleged in the said indictment within three years before the filing or return of the indictment on which the alleged conspiracy was formed.

(29) That said indictment is uncertain, indefinite, and insufficient in law as to the date of the formation of the alleged conspiracy in that it is simply alleged in general terms that the conspiracy has been a continuing conspiracy at all times since June 6th, 1901.

(30) That said indictment is insufficient in law in that it does not allege the existence of the alleged conspiracy at any particular time, or times, within three years from the return thereof, and does not allege the conscious participation of the defendant therein within said three years.

(31) That said indictment is insufficient in law in that, while it alleges overt acts within three years of the return of the said indictment, it does not allege that within said three years defendant gave his consent or agreement to the continued existence and execution of said conspiracy.

(32) That said indictment is insufficient in law in that it does not state the names of the parties who formed a conspiracy within

98 three years next before the return of said indictment, nor does it state, or attempt to state, the names of the persons who were connected with said conspiracy within said period of three years, nor does it state that the names of the persons, or any of the persons who formed the said alleged conspiracy within three years, or who were connected with it, were, to the grand jury, unknown, but simply says that the conspiracy was formed on June 6th, 1901, by defendants, with other persons to the grand jury unknown, and continued until the return of said indictment.

(33) That said indictment is insufficient in law in that it does not allege what the conspiracy, charged to exist within three years next prior to the return of said indictment, consisted of or was, or the means or method that was, or were, to be adopted to carry out the same, save and except by reference to an alleged conspiracy said to have existed more than three years prior to the return of said indictment, and which alleged offense was and is barred by the statute of limitations of three years.

(34) That said indictment is indefinite, uncertain, and insufficient in charging any offense to have been committed within three years before the filing of said indictment in that the said indictment shows on its face that the alleged plan of the alleged conspirators, by which said alleged conspiracy was to be carried out, could not have been adopted within said period of three years, because said indict-

99 ment alleges that as to large numbers of the tracts of land mentioned in the said indictment the things alleged to have been planned had been carried out more than three years before the

return of said indictment, and therefore could not have been a part of any plan or conspiracy adopted within said period of three years.

(35) That said indictment is indefinite, uncertain, and insufficient in law in that it is not alleged that defendants, or any of them, at any place within the District of Colorado, conspired, confederated, or agreed to do anything whatever within the period of three years next before the return of said indictment, there being no allegation whatever as to the place of the conspiracy or the agreement to cooperate, or of any acquiescence in said conspiracy in said period of three years, and so far as appears from said indictment no one of the defendants may have been in the District of Colorado within said period of three years.

(36) That said indictment is insufficient in law and void for duplicity in that it charges against defendant the formation of an unlawful conspiracy on, to wit, June 6th, 1901, and the doing of overt acts mentioned in paragraphs numbered 1, 2, 3, 4, 5, 6, 7,
100 8, 9, 20, 21, 22, 23, 24, 25, 26, 27, 28, 39, 40, 41, 42, 43, 44, 45, 46, and 47, and also charges the defendant in the same count with the crime of conspiracy committed at a time within three years next prior to June 22, 1907, and the doing thereunder of overt acts mentioned in paragraphs 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, and 68, thereby embracing in one count two charges, or offenses, of conspiracy, and overt acts under each charge.

(37) The defendant, in support of, and as a part of, his motion to dismiss the cause and quash the indictment, because the indictment was not found or returned within three years next after the alleged offense was committed, and in support of his claim that the prosecution against defendant is barred by the statute of limitations, further says: That during all of the times mentioned in the indictment, and at the time first mentioned, to wit, June 6th, 1901, and ever since that time, the defendant has been a citizen and resident of the State of Colorado, and has, during said entire period of time, resided and lived and actually been in the State of Colorado, and he has never been a fugitive from justice in any way, nor has he ever, at any time, fled from justice, and that his whereabouts in the State
101 of Colorado have *have* never been concealed, and were well known to the people of the State of Colorado, and the prosecuting officers of the United States Government. And defendant further says that he has never, at any time, left the district for the purpose of avoiding arrest, and he could have been easily apprehended or arrested had any indictment been found against him at any time since said 6th day of June, 1901. He further states that no information or criminal complaint of any kind was filed against him, and that he was not arrested until after the return of the indictment in this cause, which was returned on the 22nd day of June, 1907.

(38) That the indictment should be quashed for the further reason, as defendant alleges the facts to be, that the grand jurors by whom said indictment was made or presented, were not regularly or legally summoned, empaneled, and sworn as required by the laws of

the United States governing such procedure in this, to wit: At the May term of this court on the day of , 1907, a grand jury was ordered to be summoned from certain counties named in the order, and the clerk of this court, in the presence of the marshal of this court, was ordered to draw by chance from the jury box the names of twenty-three persons, residents of the counties of Colorado, named in said order, and to summon them to appear on Tuesday, the 14th day of May, 1907, at ten o'clock a. m., under a venire
102 facias made returnable on that day. Thereupon the names of twenty-three persons were drawn by the clerk, such names being fully set forth in the records of this court, at page 350.

Thereafter, and on the 14th day of May, 1907, the United States marshal of the District of Colorado made return of the venire facias aforesaid, showing that thereunder he had summoned twenty-one men to serve as grand jurors. That the twenty-one individuals so summoned appeared on the return day aforesaid, and for good and sufficient reasons to the court appearing, seven of said number were excused further attendance upon the court at that time, leaving less than sixteen, to wit, fourteen, of the individuals originally summoned. Thereafter, upon these facts appearing to the court, a special venire facias was issued on said day, commanding the marshal to summon seven good and lawful men to attend and serve as grand jurors until discharged, which said venire facias was made returnable on the 14th day of May, at two o'clock p. m. That thereafter, the marshal of this court, under said special venire facias, without drawing further names from the box, summoned from the city and county of Denver, seven men, whose names appear at page 415 of the records of this court. That the summoning of said seven individuals under the special venire facias was contrary to law and the rules of
103 this court. That the seven individuals so summoned, appeared, were duly sworn and empaneled with the fourteen of the original panel, and the twenty-one individuals so summoned, empaneled, and sworn, constituted the grand jury which returned the indictment herein.

FRANK C. GOUDY AND L. F. TWITCHELL,
Attorneys for Defendant.

STATE OF COLORADO,
County of Archuleta, ss:

Eudolphus M. Taylor, being first duly sworn, upon oath deposes: That he is the defendant above named. That he has heard read the foregoing motion, and that the statements of facts therein made and contained are true of his own knowledge.

EUDOLPHUS M. TAYLOR.

Subscribed and sworn to before me this 16th day of November, 1907.

[Seal District Court Archuleta County.]

M. O. LANGWORTHY,
Clerk District Court.

(Endorsed:) No. 2029. United States of America, District of Colorado, ss. In the District Court sitting at Denver. The United

States of America versus Alexander T. Sullenberger, James S. Hatcher, Ellis M. Hampton, Eph. K. Caldwell, Robert E. Sloan, and Eudolphus M. Taylor, defendants. Motion of defendant, Eudolphus M. Taylor. Filed Nov. 20, 1907, Charles W. Bishop, clerk. Goudy & Twitchell.

UNITED STATES OF AMERICA,
District of Columbia, ss:

In the District Court, sitting at Denver.

THE UNITED STATES OF AMERICA, *v.* ALEXANDER T. SULLENBERGER, JAMES S. HATCHER, ELLIS M. HAMPTON, EPH. K. CALDWELL, ROBERT E. SLOAN, and EUDOLPHUS M. TAYLOR, defendants.	No. 2029. Motion of defendant, James S. Hatcher.

Comes the defendant, James S. Hatcher, and moves the
104 court to quash the indictment herein, and dismiss this cause against defendant, for the following reasons:

(1) The said indictment and the matters therein contained and set forth are not sufficient in law, and he, the said defendant, is not bound by the law of the land to answer the same.

(2) The said indictment is indefinite, uncertain, and insufficient in law in that it does not charge this defendant with having committed any offense against the laws of the United States, and does not state facts sufficient to show that any offense was committed by this defendant.

(3) That said indictment is indefinite, insufficient, and uncertain in law in that it can not be understood or determined from said indictment what lands the defendant is having charged with conspiring to obtain.

(4) That said indictment is indefinite, uncertain, and insufficient in law in that it does not contain any description of, or in any way identify the alleged two thousand nine hundred and ninety (2,990) acres of timber lands which it is alleged defendants conspired to obtain from the United States.

(5) That said indictment is indefinite, uncertain, and insufficient in law in that it described in that part of the indictment entitled "Overt acts," nineteen different tracts of land, and in other
105 parts of the indictment refers to only eighteen of the said tracts, and it is uncertain whether the charge against defendant is that he conspired to obtain for the Pagosa Lumber Company eighteen or nineteen different tracts of land.

(6) The said indictment is indefinite, uncertain, and insufficient in law in that it is therein alleged that the defendants conspired to obtain two thousand nine hundred and ninety (2,990) acres of land, alleged to be thereafter described in that part of the indictment which mentions alleged overt acts one to eighteen, whereas the land described in the paragraphs of the indictment referring to said alleged

overt acts one to eighteen only embrace and cover tracts described as containing two thousand eight hundred and thirty (2,830) acres of land.

(7) The said indictment is indefinite, uncertain, and insufficient in law in that it cannot be told from said indictment which particular tracts of land mentioned in the indictment it is claimed the defendant conspired with others to unlawfully obtain for the Pagosa Lumber Company, in that the indictment alleges, first, that the lands sought to be obtained are described in overt acts one to eighteen, and then follows, later in the indictment, charges with reference to nineteen alleged different tracts of land, and then later in the indictment follows an allegation that the defendants conspired to obtain cer-
106 tain of the public lands and property of the United States without any statement as to whether the conspiracy embraced eighteen tracts or nineteen tracts, wherefore defendant says that he cannot learn from the indictment as to what land he is charged with having conspired to obtain, especially in view of the fact that the first eighteen alleged tracts mentioned in the indictment are not alleged to embrace two thousand nine hundred and ninety acres, and are only alleged, later in the indictment, to embrace two thousand seven hundred and ninety acres, and, also, in view of the fact that even the entire nineteen tracts of land described in the indictment do not embrace, according to the description given, as much as two thousand nine hundred and ninety acres.

(8) That said indictment is indefinite, uncertain, and insufficient at law in that it is alleged in paragraph 38 as one of the overt acts charged to have been committed, that the defendant Ellis M. Hampton furnished to one Mary C. Brown four hundred dollars ($400) for use by said Henry Brown in paying for lands described in overt act numbered nineteen. Said indictment is indefinite and uncertain for the reasons that the first statement in the indictment as to the alleged conspiracy does not purport to embrace the lands mentioned in overt act numbered nineteen, whereas they are mentioned in said
107 paragraph 38. Defendant further says it cannot be told from said paragraph 38 whether it was intended by the indictment to allege that the money was paid to said Mary C. Brown or the said Henry Brown.

(9) That said indictment is indefinite, uncertain, and insufficient in that it is not alleged that the said alleged conspiracy embraced the plan of hiring or obtaining the alleged entrymen, or any of them, to make application to purchase lands, or contracting or agreeing with them in advance of their, or any of them, having filed applications to purchase lands, that defendants, or any of them, or the Pagosa Lumber Company, would purchase the lands they would obtain, or would seek to obtain from the United States, nor is there any allegation that the defendants, or any of them, did hire or obtain any person to make application to purchase any lands, or did agree with any person directly or indirectly, in advance of the said person making his application to purchase, that defendants or any of them, or the

Pagosa Lumber Company, would buy the lands which any such person would make application to purchase, nor is there any allegation that the defendants, or any one or more of them had anything whatsoever to do with the filing of applications to purchase lands made by any one or more of the alleged entrymen, nor is there any allegation that the alleged entrymen at the time they made and filed
108 their applications to purchase lands, made to the United States, or any officer thereof, any false or untrue statement or oath, nor is there any allegation that any entryman at the time he made and filed his application to purchase, and took and fied or caused to be filed the affidavit required to accompany such oath, was other than an honest and bona fide applicant for the purchase of lands.

(10) That said indictment is indefinite, uncertain, and insufficient in that it is not alleged what was contained in the alleged documents called "testimony of claimant," mentioned in paragraphs one to nineteen, under the heading "Overt acts," which it is alleged defendant procured said alleged entrymen to execute and verify.

(11) That said indictment is indefinite and uncertain and insufficient in that it is not alleged that defendant conspired to cause any person to make any false oath, or that any entryman did make any false oath at any time, or that the defendants, or any of them, conspired to have any such thing done by any one at any time, or caused, or attempted to cause, any such thing to be done.

(12) That said indictment is insufficient in that, so far as appears from said indictment, the alleged conspiracy was simply an
109 agreement or plan to furnish to persons who had already in good faith made applications to purchase timber lands, and had honestly and truthfully and in good faith made the affidavits required of them by the statute, the moneys necessary to be paid by them for said lands, and then to have conveyances made by said entrymen and patent obtained therefor.

(13) That said indictment is insufficient in law in that it does not allege that said lands or any of them were mineral lands.

(14) That said indictment is insufficient in law in that it does not allege that any entryman, so entering timber lands, was not possessed of all the legal requirements required by law of persons seeking to enter timber lands, there being no law making it illegal for a bona fide applicant for the purchase of timber lands, possessed of the required qualifications, after making his application and filing the required oath, to then, in advance of his entry or purchase, make any contract with any one else touching said land.

(15) That said indictment is indefinite, uncertain, and insufficient in law in that it charges this defendant and his codefendants with having conspired, combined, confederated, and agreed together "and with divers other persons to the said grand jury unknown,"
110 whereas the said indictment shows on its face that said statement as to said alleged other persons being unknown to the grand jury is not, and was not, true or correct.

(16) That said indictment is indefinite, uncertain, and insufficient in law in that it is not alleged how or by what way or method or means the defendant caused or procured the issuance by the United States of the patents, or any one or more of them, mentioned in paragraphs 58 to 68 inclusive, it not being alleged whether anything was done by defendant within three years, or whether the issuance of the said patents was simply the formal act of the Government in pursuance of its approval of entries made more than three years prior thereto.

(17) The said indictment is indefinite, uncertain, and insufficient in law in that the allegations as to lands alleged to have been obtained through one Henry Brown, to wit, the east half of the northwest quarter, and the south half of the northeast quarter of section 23, in township 34 north, range two west, N. M. P. M., are mentioned and described in the paragraph nineteen of the alleged overt acts, do not seem to be connected with the alleged conspiracy, yet charges are made in connection with said land in the paragraphs of alleged overt acts numbered 19, 38, and 57.

(18) That said indictment is indefinite, uncertain, and insufficient at law in that paragraph 12 of the alleged overt
111 acts, a tract of land is mentioned as containing one hundred and sixty (160) acres, when the description furnished in the same paragraph shows only one hundred and twenty (120) acres.

(19) That said indictment is indefinite, uncertain, and insufficient at law in that there is attempted to be described in paragraph 7 of the alleged overt acts a tract of land lying in one body, which is stated to be the northeast quarter of the southeast quarter of section 35, the southeast quarter of the southeast quarter of section 26, and the west half of the southwest quarter of section 25, in township 36 north and range two and one-half west, reference being had to the New Mexico principal meridian, containing one hundred and sixty (160) acres; whereas, as appears from said indictment, no such body of land could possibly exist, and the description is an impossible description, and one which describes no body of land which ever did or ever could exist.

(20) That said indictment is indefinite, uncertain, and insufficient at law in that there is attempted to be described in paragraph 4 of the alleged overt acts an alleged tract of land, but said description is so uncertain and indefinite that it cannot be told what tract of land is intended to be described.

(21) That said indictment is indefinite, uncertain, and insufficient at law in that there is attempted to be described in paragraph
112 16 of the alleged overt acts an alleged tract of land of one hundred and sixty (160) acres, which description is an impossible description, and does not identify and could not identify any tract of land.

(22) That said indictment is indefinite, uncertain, and insufficient at law in that it is alleged in paragraph 56 of the alleged overt acts

that defendants, at Pagosa Springs, in the District of Colorado, required one Mary C. Brown to execute a certain deed therein mentioned.

(23) That said indictment is indefinite, uncertain, and insufficient at law in that it is alleged in paragraph 44 of the alleged overt acts that defendants required one of the alleged entrymen to execute a deed to the Hatcher Mercantile Company, and it is not alleged that said alleged grantee took the title thereto in trust for the Pagosa Lumber Company, or held it in trust or for the benefit of said company, or that there was any intention to have said land so held, nor is there any statement as to in what way the said Pagosa Lumber Company did or could profit by said conveyance.

(24) That said indictment is insufficient in law in that it does not allege that the alleged conspiracy therein mentioned, or attempted to be set forth, was formed within three years before the return or filing of the said indictment.

113 (25) That said indictment is insufficient in law in that it shows upon its face that the alleged conspiracy was formed more than three years before the return or filing of said indictment, which was on the 6th day of June, 1901, and that overt acts mentioned in paragraphs numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 20, 21, 22, 23, 24, 25, 26, 27, 28, 39, 40, 41, 42, 43, 44, 45, 46, and 47 are alleged to have been committed under and in pursuance of said conspiracy more than three years before the return of said indictment, all of said alleged overt acts being alleged to have been committed in the said year 1901.

(26) That said indictment shows on its fact that the said prosecution against defendant, and said alleged offense, is barred by the statute of limitations of three years in such cases made and provided.

(27) That said indictment is indefinite, uncertain, and insufficient in law in that it makes no charge or allegation that any unlawful conspiracy was formed at any time within three years prior to the return or filing of said indictment, but simply alleges that a conspiracy was formed and overt acts committed at times more than three years prior to the return of said indictment, and that at times within said period of three years the defendants did certain other overt acts.

114 (28) That said indictment is uncertain, indefinite, and insufficient in law in that there is no date fixed or stated or alleged in the said indictment within three years before the filing or return of the indictment, on which the alleged conspiracy was formed.

(29) That said indictment is uncertain, indefinite, and insufficient in law as to the date of the formation of the alleged conspiracy, in that it is simply alleged in general terms that the conspiracy has been a continuing conspiracy at all times since June 6th, 1901.

(30) That said indictment is insufficient in law in that it does not allege the existence of the alleged conspiracy at any particular time, or times, within three years from the return thereof, and does not

allege the conscious participation of the defendant therein within said three years.

(31) That said indictment is insufficient in law in that, while it alleges overt acts within three years of the return of the said indictment, it does not allege that within said three years defendant gave his consent or agreement to the continued existence and execution of said conspiracy.

(32) That said indictment is insufficient in law in that it does not state the names of the parties who formed a conspiracy within
115 three years next before the return of said indictment, nor does it state, or attempt to state, the names of the persons who were connected with said conspiracy within said period of three years, nor does it state that the names of the persons, or any of the persons, who formed the said alleged conspiracy within three years, or who were connected with it, were to the grand jury unknown, but simply says that the conspiracy was formed on June 6th, 1901, by defendants, with other persons to the grand jury unknown, and continued until the return of said indictment.

(33) That said indictment is insufficient in law in that it does not allege what the conspiracy, charged to exist within three years next prior to the return of said indictment, consisted of, or was, or the means or method that was, or were, to be adopted to carry out the same, save and except by reference to an alleged conspiracy said to have existed more than three years prior to the return of said indictment, and which alleged offense was and is barred by the statute of limitations of three years.

(34) That said indictment is indefinite, uncertain, and insufficient in charging any offense to have been committed within three years before the filing of said indictment, in that the said indictment shows on its face that the alleged plan of the alleged conspirators, by which said alleged conspiracy was to be carried out, could not have been adopted within said period of three years, because said indict-
116 ment alleges that, as to large numbers of the tracts of lands mentioned in the said indictment, the things alleged to have been planned had been carried out more than three years before the return of said indictment, and therefore could not have been a part of any plan or conspiracy adopted within said period of three years.

(35) That said indictment is indefinite, uncertain, and insufficient in law in that it is not alleged that defendants, or any of them, at any place within the District of Colorado, conspired, confederated, or agreed to do anything whatever within the period of three years next before the return of said indictment, there being no allegation whatever as to the place of the conspiracy, or the agreement to cooperate, or of any acquiescence in said conspiracy in said period of three years, and, so far as appears from said indictment, no one of the defendants may have been in the District of Colorado within said period of three years.

(36) That said indictment is insufficient in law and void for duplicity in that it charges against defendant the formation of an un-

lawful conspiracy, on, to wit, June 6th, 1901, and the doing of overt acts mentioned in paragraphs numbered 1, 2, 3, 4, 5, 6, 7, 8, 9,
117 20, 21, 22, 23, 24, 25, 26, 27, 28, 39, 40, 41, 42, 43, 44, 45, 46, and 47, and also charges the defendant in the same count with the crime of conspiracy committed at a time within three years next prior to June 22, 1907, and the doing thereunder of overt acts mentioned in paragraphs 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, and 68, thereby embracing in one count two charges, or offenses, of conspiracy, and overt acts under each charge.

(37) The defendant, in support of, and as a part of, his motion to dismiss the cause and quash the indictment, because the indictment was not found or returned within three years next after the alleged offense was committed, and in support of his claim that the prosecution against defendant is barred by the statute of limitations, further says: That during all of the times mentioned in the indictment, and at the time first mentioned, to wit, June 6th, 1901, and ever since that time, the defendant has been a citizen and resident of the State of Colorado, and has, during said entire period of time, resided and lived and actually been in the State of Colorado, and he has never been a fugitive from justice in any way, nor has he ever, at any time, fled from justice, and that his whereabouts in the State
118 of Colorado have never been concealed, and were well known to the people of the State of Colorado, and the prosecuting officers of the United States Government. And defendant further says that he has never, at any time, left the district for the purpose of avoiding arrest, and he could have been easily apprehended or arrested had any indictment been found against him at any time since said 6th day of June, 1901. He further states that no information or criminal complaint of any kind was filed against him, and that he was not arrested until after the return of the indictment in this cause, which was returned on the 22nd day of June, 1907.

(38) That the indictment should be quashed for the further reason, as defendant alleges the facts to be, that the grand jurors by whom said indictment was made or presented were not regularly or legally summoned, empaneled, and sworn as required by the laws of the United States governing such procedure in this, to wit: At the May term of this court on the day of , 1907, a grand jury was ordered to be summoned from certain counties named in the order, and the clerk of this court, in the presence of the marshal of this court, was ordered to draw by chance from the jury box the names of twenty-three persons, residents of the counties of Colorado, named in said order, and to summon them to appear on Tuesday, the 14th day of May, 1907, at ten o'clock a. m., under
119 a venire facias made returnable on that day. Thereupon the names of twenty-three persons were drawn by the clerk, such names being fully set forth in the records of this court, at page 350.

Thereafter, and on the 14th day of May, 1907, the United States marshal of the District of Colorado, made return of the venire facias aforesaid, showing that thereunder he had summoned twenty-one men to serve as grand jurors. That the twenty-one individuals so summoned appeared on the return day aforesaid, and for good and sufficient reasons to the court appearing, seven of said number were excused further attendance upon the court at that time, leaving less than sixteen, to wit, fourteen, of the individuals originally summoned. Thereafter, upon these facts appearing to the court, a special venire facias was issued on said day, commanding the marshal to summon seven good and lawful men to attend and serve as grand jurors until discharged, which said venire facias was made returnable on the 14th day of May, at two o'clock p. m. That thereafter, the marshal of this court, under said special venire facias, without drawing further names from the box, summoned from the city and county of Denver, seven men, whose names appear at page 415 of the records of this court. That the summoning of said seven individuals under the special venire facias was contrary to law and the
120 rules of this court. That the seven individuals so summoned, appeared, were duly sworn and empaneled with the fourteen of the original panel, and the twenty-one individuals so summoned, impaneled, and sworn, constituted the grand jury which returned the indictment herein.

CHAS. L. HENDERSHOTT,
RICHARDSON & HAWKINS,
Attorneys for Defendant.

STATE OF COLORADO,
County of Archuleta, ss:

James S. Hatcher, being first duly sworn, upon oath deposes: That he is the defendant above named. That he has heard read the foregoing motion, and that the statements of facts therein made and contained are true of his own knowledge.

JAMES S. HATCHER.

Subscribed and sworn to before me this the 14th day of November, 1907.

My commission expires Nov. 29th, 1909.
(Notarial seal)

VICTOR C. McGIRR,
Notary Public.

(Endorsed:) No. 2029. United States of America, District of Colorado, ss. In the United States District Court. The United States of America versus Alexander T. Sullenberger, James S. Hatcher, Ellis M. Hampton, Eph. K. Caldwell, Robert E. Sloan, and Eudolphus M. Taylor, defendants. Motion of defendant James S. Hatcher to quash indictment, etc. Filed Nov. 23, 1907, Charles W. Bishop, clerk. Richardson & Hawkins, attorneys for defendant, 401 to 407 Ernest & Cranmer Building, Denver, Colo.

121 UNITED STATES OF AMERICA,
District of Colorado, ss:

In the District Court, sitting at Denver.

THE UNITED STATES OF AMERICA,
v.
ALEXANDER T. SULLENBERGER, JAMES S. HATCHER, ELLIS M. HAMPTON, EPH. K. CALDWELL, ROBERT E. SLOAN, and EUDOLPHUS M. TAYLOR, defendants.

No. 2029. Motion of defendant Robert E. Sloan.

Comes the defendant, Robert E. Sloan, and moves the court to quash the indictment herein, and dismiss this cause against defendant, for the following reasons:

(1) The said indictment and the matters therein contained and set forth are not sufficient in law, and he, the said defendant, is not bound by the law of the land to answer the same.

(2) The said indictment is indefinite, uncertain, and insufficient in law in that it does not charge this defendant with having committed any offense against the laws of the United States, and does not state facts sufficient to show that any offense was committed by this defendant.

(3) That said indictment is indefinite, insufficient, and uncertain in law in that it can not be understood or determined from said
122 indictment what lands the defendant is having charged with conspiring to obtain.

(4) That said indictment is indefinite, uncertain, and insufficient in law in that it does not contain any description of, or in any way identify the alleged two thousand nine hundred and ninety (2,990) acres of timber lands which it is alleged defendants conspired to obtain from the United States.

(5) The said indictment is indefinite, uncertain, and insufficient in law in that it describes in that part of the indictment entitled "Overt Acts," nineteen different tracts of land, and in other parts of the indictment refers to only eighteen of the said tracts, and it is uncertain whether the charge against defendant is that he conspired to obtain for the Pagosa Lumber Company eighteen or nineten different tracts of land.

(6) The said indictment is indefinite, uncertain, and insufficient in law in that it is therein alleged that the defendants conspired to obtain two thousand nine hundred and ninety (2,990) acres of land, alleged to be thereafter described in that part of the indictment which mentions alleged overt acts one to eighteen, whereas the land described in the paragraphs of the indictment referring to said alleged overt acts one to eighteen only embrace and cover tracts only described as containing two thousand eight hundred and thirty (2,830) acres of land.

123 (7) The said indictment is indefinite, uncertain, and insufficient in law in that it cannot be told from said indictment which particular tracts of land mentioned in the indictment it is claimed the defendant conspired with others to unlawfully obtain for the Pagosa Lumber Company, in that the indictment alleges, first, that the lands sought to be obtained are described in overt acts one to eighteen, and then follows, later in the indictment, charges with reference to nineteen alleged different tracts of land, and then later in the indictment follows an allegation that the defendants conspired to obtain certain of the public lands and property of the United States, without any statement as to whether the conspiracy embraced eighteen tracts or nineteen tracts, wherefore defendants says that he cannot learn from the indictment as to what land he is charged with having conspired to obtain, especially in view of the fact that the first eighteen alleged tracts mentioned in the indictment are not alleged to embrace two thousand nine hundred and ninety acres, and are only alleged later in the indictment to embrace two thousand seven hundred and ninety acres, and, also, in view of the fact that even the entire nineteen tracts of land described in the indictment do not embrace, according to the description given, as much as two thousand nine hundred and ninety acres.

124 (8) That said indictment is indefinite, uncertain, and insufficient at law in that it is alleged in paragraph 38, as one of the overt acts charged to have been committed, that the defendant, Ellis M. Hampton, furnished to one Mary C. Brown four hundred dollars ($400) for use by said Henry Brown in paying for lands described in overt act numbered nineteen. Said indictment is indefinite and uncertain for the reasons that the first statement in the indictment as to the alleged conspiracy does not purport to embrace the lands mentioned in overt act numbered nineteen, whereas they are mentioned in said paragraph 38. Defendant further says it cannot be told from said paragraph 38 whether it was intended by the indictment to allege that the money was paid to said Mary C. Brown or the said Henry Brown.

(9) The said indictment is indefinite, uncertain, and insufficient in that it is not alleged that the said alleged conspiracy embraced the plan of hiring or obtaining the alleged entrymen, or any of them, to make application to purchase lands, or contracting or agreeing with them in advance of their, or any of them, having filed applications to purchase lands, that defendants, or any of them, or the Pagosa Lumber Company, would purchase the lands they would obtain, or would seek to obtain from the United States, nor is there any allegation that the defendants, or any of them, did hire or obtain any

125 person, to make application to purchase any lands, or did agree with any person, directly or indirectly, in advance of the said person making his application to purchase, that defendants, or any of them, or the Pagosa Lumber Company, would buy the lands which any such person would make application to purchase, nor is there any

allegation that the defendants, or any one or more of them, had anything whatsoever to do with the filing of applications to purchase lands made by any one or more of the alleged entrymen, nor is there any allegation that the alleged entrymen, at the time they made and filed their applications to purchase lands, made to the United States, or any officer thereof, any false or untrue statement or oath, nor is there any allegation that any entryman, at the time he made and filed his application to purchase, and took and filed, or caused to be filed, the affidavit required to accompany such oath, was other than an honest and bona fide applicant for the purchase of lands.

(10) That said indictment is indefinite, uncertain, and insufficient in that it is not alleged what was contained in the alleged documents called "testimony of claimant," mentioned in paragraphs one to nineteen, under the heading "Overt acts," which it is alleged defendant procured said alleged entryman to execute and verify.

126 (11) That said indictment is indefinite and uncertain and insufficient in that it is not alleged that defendant conspired to cause any person to make any false oath, or that any entryman did make any false oath at any time, or that the defendants, or any of them, conspired to have any such thing done by any one at any time, or cause, or attempted to cause, any such thing to be done.

(12) That said indictment is insufficient in that, so far as appears from said indictment, the alleged conspiracy was simply an agreement or plant to furnish to persons, who had already in good faith made applications to purchase timber lands, and had honestly and truthfully, and in good faith, made the affidavits required of them by the statute, the moneys necessary to be paid by them for said lands, and then to have conveyances made by said entrymen and patent obtained therefor.

(13) That said indictment is insufficient in law in that it does not allege that said lands or any of them were mineral lands.

(14) That said indictment is insufficient in law in that it does not allege that any entryman, so entering timber lands, was not possessed of all the legal requirements required by law of persons seeking

127 to enter timber lands, there being no law making it illegal for a bona fide applicant for the purchase of timber lands, possessed of the required qualifications, after making his application and filing the required oath, to then, in advance of his entry or purchase, make any contract with any one else touching said land.

(15) That said indictment is indefinite, uncertain, and insufficient in law, in that it charges this defendant and his codefendants with having conspired, combined, confederated, and agreed together "and with divers other persons to the said grand jury unknown," whereas the said indictment shows on its face that said statement as to said alleged other persons being unknown to the grand jury is not, and was not, true or correct.

(16) That said indictment is indefinite, uncertain, and insufficient in law in that it is not alleged how or by what way or method or

means the defendant caused or procured the issuance by the United States of the patents, or any one or more of them, mentioned in paragraphs 58 to 68 inclusive, it not being alleged whether anything was done by defendant within three years, or whether the issuance of the said patents was simply the formal act of the Government in pursuance of its approval of entries made more than three years prior thereto.

(17) The said indictment is indefinite, uncertain, and insuf-
128 ficient in law in that the allegations as to lands alleged to have been obtained through one Henry Brown, to wit, the east half of the northwest quarter, and the south half of the northeast quarter of section 23, in township 34 north, range two west, N. M. P. M., are mentioned and described in the paragraph nineteen of the alleged overt acts, do not seem to be connected with the alleged conspiracy, yet charges are made in connection with said lands in the paragraphs of alleged overt acts numbered 19, 38, and 57.

(18) That said indictment is indefinite, uncertain, and insufficient at law, in that paragraph 12 of the alleged overt acts, a tract of land is mentioned as containing one hundred and sixty (160) acres, when the description furnished in the same paragraph shows only one hundred and twenty (120) acres.

(19) That said indictment is indefinite, uncertain, and insufficient at law in that there is attempted to be described in paragraph 7 of the alleged overt acts, a tract of land lying in one body, which is stated to be the northeast quarter of the southeast quarter of section 35, the southeast quarter of the southeast quarter of section 26, and the west half of the southwest quarter of section 25, in township 36 north and range two and one-half west, reference being had to the New Mexico principal meridian, containing one hundred and sixty (160) acres; whereas, as appears from said indictment, no such
129 body of land could possibly exist, and the description is an impossible description, and one which describes no body of land which ever did or ever could exist.

(20) That said indictment is indefinite, uncertain, and insufficient at law in that there is attempted to be described in paragraph 4 of the alleged overt acts, an alleged tract of land, but said description is so uncertain and indefinite, that it cannot be told what tract of land is intended to be described.

(21) That said indictment is indefinite, uncertain, and insufficient at law in that there is attempted to be described in paragraph 16 of the alleged overt acts an alleged tract of land of one hundred and sixty (160) acres, which description is an impossible description, and does not identify and could not identify any tract of land.

(22) That said indictment is indefinite, uncertain, and insufficient at law in that it is alleged in paragraph 50 of the alleged overt acts that defendants, at Pagosa Springs, in the District of Columbia, required one Mary C. Brown to execute a certain deed therein mentioned.

(23) That said indictment is indefinite, uncertain, and insufficient at law in that it is alleged in paragraph 44 of the alleged overt acts that defendants required one of the alleged entrymen to execute a deed to the Hatcher Mercantile Company, and it is not alleged
130 that said alleged grantee took the title thereto in trust for the Pagosa Lumber Company, or held it in trust or for the benefit of said company, or that there was any intention to have said land so held, nor is there any statement as to in what way the said Pagosa Lumber Company did or could profit by said conveyance.

(24) That said indictment is insufficient in law in that it does not allege that the alleged conspiracy therein mentioned or attempted to be set forth was formed within three years before the return or filing of the said indictment.

(25) That said indictment is insufficient in law in that it shows upon its face that the alleged conspiracy was formed more than three years before the return or filing of said indictment, which was on the 6th day of June, 1901, and that overt acts mentioned in paragraphs numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 20, 21, 22, 23, 24, 25, 26, 27, 28, 39, 40, 41, 42, 43, 44, 45, 46, and 47 are alleged to have been committed under and in pursuance of said conspiracy more than three years before the return of said indictment, all of said alleged overt acts being alleged to have been committed in the said year 1901.

(26) That said indictment shows on its face that the said prosecution against defendant, and said alleged offense, is barred by the statute of limitations of three years insuch cases made and provided.

131 (27) That said indictment is indefinite, uncertain, and insufficient in law in that it makes no charge or allegation that any unlawful conspiracy was formed at any time within three years prior to the return or filing of said indictment, but simply alleges that a conspiracy was formed, and overt acts committed, at times more than three years prior to the return of said indictment, and that at times within said period of three years the defendants did certain other overt acts.

(28) That said indictment is uncertain, indefinite, and insufficient in law in that there is no date fixed or stated or alleged in the said indictment within three years before the filing or return of the indictment on which the alleged conspiracy was formed.

(29) That said indictment is uncertain, indefinite, and insufficient in law as to the date of the formation of the alleged conspiracy in that it is simply alleged in general terms that the conspiracy has been a continuing conspiracy at all times since June 6th, 1901.

(30) That said indictment is insufficient in law in that it does not allege the existence of the alleged conspiracy at any particular time, or times, within three years from the return thereof and does
132 not allege the conscious participation of the defendant therein within said three years.

(31) That said indictment is insufficient in law in that while it alleges overt acts within three years of the return of the said indictment, it does not allege that within said three years defendant gave his consent or agreement to the continued existence and execution of said conspiracy.

(32) That said indictment is insufficient in law in that it does not state the names of the parties who formed a conspiracy within three years next before the return of said indictment, nor does it state, or attempt to state, the names of the persons who were connected with said conspiracy within said period of three years, nor does it state that the names of the persons or any of the persons who formed the said alleged conspiracy within three years, or who were connected with it were to the grand jury unknown, but simply says that the conspiracy was formed on June 6th, 1901, by defendants with other persons to the grand jury unknown and continued until the return of said indictment.

(33) That said indictment is insufficient in law in that it does not allege what the conspiracy, charged to exist within three years next prior to the return of said indictment, consisted of or was, or the means or method that was, or were, to be adopted to carry
133 out the same, save and except by reference to an alleged conspiracy said to have existed more than three years prior to the return of said indictment, and which alleged offense was and is barred by the statute of limitations of three years.

(34) That said indictment is indefinite, uncertain, and insufficient in charging any offense to have been committed within three years before the filing of said indictment in that the said indictment shows on its fact that the alleged plan of the alleged conspirators, by which said alleged conspiracy was to be carried out, could not have been adopted within said period of three years, because said indictment alleges that, as to large numbers of the tracts of land mentioned in the said indictment, the things alleged to have been planned had been carried out more three years before the return of said indictment, and therefore could not have been a part of any plan or conspiracy adopted within said period of three years.

(35) That said indictment is indefinite, uncertain, and insufficient in law in that it is not alleged that defendants, or any of them, at any place within the District of Colorado, conspired, confederated, or agreed to do anything whatever within the period of three years next before the return of said indictment, there being no allegation whatever as to the place of the conspiracy, or the agreement
134 to cooperate, or of any acquiescence in said conspiracy in said period of three years, and, so far as appears from said indictment, no one of the defendants may have been in the District of Colorado within said period of three years.

(36) That said indictment is insufficient in law and void for duplicity in that it charges against defendant the formation of an unlawful conspiracy, on, to wit, June 6th, 1901, and the doing of

overt acts mentioned in paragraphs numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 20, 21, 22, 23, 24, 25, 26, 27, 28, 39, 40, 41, 42, 43, 44, 45, 46, and 47, and also charges the defendant in the same count with the crime of conspiracy committed at a time within three years next prior to June 22, 1907, and the doing thereunder of overt acts mentioned in paragraphs 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, and 68, thereby embracing in one count two charges, or offenses, of conspiracy, and overt acts under each charge.

(37) The defendant, in support of, and as a part of, his motion to dismiss the cause and quash the indictment, because the indictment was not found or returned within three years next after the alleged offense was committed, and in support of his claim that the prosecution against defendant is barred by the statute of limitations,
135 further says: That during all of the times mentioned in the indictment, and at the time first mentioned, to wit, June 6th, 1901, and ever since that time, the defendant has been a citizen and resident of the State of Colorado, and has, during said entire period of time, resided and lived and actually been in the State of Colorado, and he has never been a fugitive from justice in any way, nor has he ever, at any time, fled from justice, and that his whereabouts in the State of Colorado have never been concealed, and were well known to the people of the State of Colorado, and the prosecuting officers of the United States Government. And defendant further says that he has never, at any time, left the district for the purpose of avoiding arrest, and he could have been easily apprehended or arrested had any indictment been found against him at any time since said 6th day of June, 1901. He further states that no information or criminal complaint of any kind was filed against him, and that he was not arrested until after the return of the indictment, in this cause, which was returned on the 22nd day of June, 1907.

(38) That the indictment should be quashed for the further reason, as defendant alleges the facts to be, that the grand jurors by whom said indictment was made or presented, were not regularly or legally
summoned, empaneled, and sworn as required by the laws of
136 the United States governing such procedure in this, to wit: At the May term of this court on the day of , 1907, a grand jury was ordered to be summoned from certain counties named in the order, and the clerk of this court, in the presence of the marshal of this court, was ordered to draw by chance from the jury box the names of twenty-three persons, residents of the counties of Colorado, named in said order, and to summon them to appear on Tuesday, the 14th day of May, 1907, at ten o'clock a. m., under a venire facias made returnable on that day. Thereupon the names of twenty-three persons were drawn by the clerk, such names being fully set forth in the records of this court, at page 350.

Thereafter, and on the 14th day of May, 1907, the United States marshal of the District of Colorado, made return of the venire facias

aforesaid, showing that thereunder he had summoned twenty-one men to serve as grand jurors. That the twenty-one individuals so summoned, appeared on the return day aforesaid, and for good and sufficient reasons to the court appearing, seven of said number were excused further attendance upon the court at that term, leaving less than sixteen, to wit, fourteen, of the individuals originally summoned. Thereafter, upon these facts appearing to the court, a special venire facias was issued on said day, commanding the marshal to summon seven good and lawful men to attend and serve as grand jurors until discharged, which said venire facias was made return-
137 able on the 14th day of May, at two o'clock p. m. That thereafter, the marshal of this court, under said special venire facias, without drawing further names from the box, summoned from the city and county of Denver, seven men, whose names appear at page 415 of the records of this court. That the summoning of said seven individuals under the special venire facias was contrary to law and the rules of this court. That the seven individuals so summoned appeared, were duly sworn, and empaneled with the fourteen of the original panel, and the twenty-one individuals so summoned, impaneled, and sworn constituted the grand jury which returned the indictment herein.

RICHARDSON & HAWKINS,
RITTER & BUCHANAN, Durango,
Attorneys for Defendant.

STATE OF COLORADO,
County of La Plata, ss:

Robert E. Sloan, being first duly sworn, upon oath deposes: That he is the defendant above named. That he has heard read the foregoing motion, and that the statements of facts therein made and contained, are true of his own knowledge.

ROBERT E. SLOAN.

Subscribed and sworn to before me this the 14th day of November, 1907.

My commission expires September 29, 1910.
(Notarial seal.) RICHARD MCCLOUD, *Notary Public.*

(Endorsed:) No. 2029. United States of America, District of Colorado, ss. In the District Court, sitting at Denver. The United States of America versus Alexander T. Sullenberger, James S. Hatcher, Ellis M. Hampton, Eph. K. Caldwell, Robert E. Sloan, and Eudolphus M. Taylor, defendants. Motion of defendant Robert E. Sloan to quash indictment, etc. Filed Nov. 23, 1907. Charles W. Bishop, clerk. Richardson & Hawkins, Ritter & Buchanan.

138 In the District Court, sitting at Denver.

UNITED STATES OF AMERICA,
District of Colorado, ss:

THE UNITED STATES OF AMERICA,
v.
ALEXANDER T. SULLENBERGER, JAMES S. Hatcher, Ellis M. Hampton, Eph. K. Caldwell, Robert E. Sloan, and Eudolphus M. Taylor, defendants.

No. 2029. Motion of defendant, A. T. Sullenberger.

Comes the defendant, Alexander T. Sullenberger, and moves the court to quash the indictment herein, and dismiss this cause against defendant, for the following reasons:

(1) The said indictment and the matters therein contained and set forth are not sufficient in law, and he, the said defendant, is not bound by the law of the land to answer the same.

(2) The said indictment is indefinite, uncertain, and insufficient in law in that it does not charge this defendant with having committed any offense against the laws of the United States, and does not state facts sufficient to show that any offense was committed by this defendant.

(3) That said indictment is indefinite, insufficient, and uncertain in law in that it can not be understood or determined from said
139 indictment what lands the defendant is having charged with conspiring to obtain.

(4) That said indictment is indefinite, uncertain, and insufficient in law in that it does not contain any description of, or in any way identify the alleged two thousand nine hundred and ninety (2,990) acres of timber lands which it is alleged defendants conspired to obtain from the United States.

(5) The said indictment is indefinite, uncertain, and insufficient in law in that it describes in that part of the indictment entitled "Overt acts," nineteen different tracts of land, and in other parts of the indictment refers to only eighteen of the said tracts, and it is uncertain whether the charge against defendant is that he conspired to obtain for the Pagosa Lumber Company eighteen or nineteen different tracts of land.

(6) The said indictment is indefinite, uncertain, and insufficient in law in that it is therein alleged that the defendants conspired to obtain two thousand nine hundred and ninety (2,990) acres of land, alleged to be thereafter described in that part of the indictment which mentions alleged overt acts one to eighteen, whereas the land described in the paragraphs of the indictment referring to said alleged overt acts one to eighteen only embrace and cover tracts only described as containing two thousand eight hundred and thirty (2,830) acres of land.

140 (7) The said indictment is indefinite, uncertain, and insufficient in law in that it cannot be told from said indictment

which particular tracts of land mentioned in the indictment it is claimed the defendant conspired with others to unlawfully obtain for the Pagosa Lumber Company, in that the indictment alleges, first, that the lands sought to be obtained are described in overt acts one to eighteen, and then follows, later in the indictment, charges with reference to nineteen alleged different tracts of land, and then later in the indictment follows an allegation that the defendants conspired to obtain certain of the public lands and property of the United States without any statement as to whether the conspiracy embraced eighteen tracts or nineteen tracts, wherefore defendant says that he cannot learn from the indictment as to what land he is charged with having conspired to obtain, especially in view of the fact that the first eighteen alleged tracts mentioned in the indictment are not alleged to embrace two thousand nine hundred and ninety acres, and are only alleged later in the indictment to embrace two thousand seven hundred and ninety acres, and, also, in view of the fact that even the entire nineteen tracts of land described in the indictment do not embrace, according to the description given, as much as two thousand nine hundred and ninety acres.

141 (8) That said indictment is indefinite, uncertain, and insufficient at law in that it is alleged in paragraph 38, as one of the overt acts charged to have been committed, that the defendant Ellis M. Hampton furnished to one Mary C. Brown four hundred dollars ($400) for use by said Henry Brown in paying for lands described in overt act numbered nineteen. Said indictment is indefinite and uncertain for the reasons that the first statement in the indictment as to the alleged conspiracy does not purport to embrace the lands mentioned in overt act numbered nineteen, whereas they are mentioned in said paragraph 38. Defendant further says it cannot be told from said paragraph 38 whether it was intended by the indictment to allege that the money was paid to said Mary C. Brown or the said Henry Brown.

(9) The said indictment is indefinite, uncertain, and insufficient in that it is not alleged that the said alleged conspiracy embraced the plan of hiring or obtaining the alleged entrymen, or any of them, to make application to purchase lands, or contracting or agreeing with them in advance of their, or any of them, having filed applications to purchase lands that defendants, or any of them, or the Pagosa Lumber Company, would purchase the lands they would obtain, or would seek to obtain from the United States, nor is there any allegation that

142 the defendants, or any of them; did hire or obtain any person to make application to purchase any lands, or did agree with any person, directly or indirectly, in advance of the said person making his application to purchase, that defendants, or any of them, or the Pagosa Lumber Company, would buy the lands which any such person would make application to purchase, nor is there any allegation that the defendants, or any one or more of them, had anything whatsoever to do with the filing of applications to purchase lands made by any one or more of the alleged entrymen, nor is there

any allegation that the alleged entrymen, at the time they made and filed their applications to purchase lands, made to the United States, or any officer thereof, any false or untrue statement or oath, nor is there any allegation that any entryman, at the time he made and filed his application to purchase, and took and filed, or caused to be filed, the affidavit required to accompany such oath, was other than an honest and bona fide applicant for the purchase of lands.

(10) That said indictment is indefinite, uncertain, and insufficient in that it is not alleged what was contained in the alleged documents called "testimony of claimant," mentioned in paragraphs one to nineteen, under the heading "Overt acts," which it is alleged defendant procured said alleged entrymen to execute and verify.

143 (11) That said indictment is indefinite and uncertain and insufficient in that it is not alleged that defendant conspired to cause any person to make any false oath, or that any entryman did make any false oath at any time, or that the defendants, or any of them, conspired to have any such thing done by any one at any time, or cause, or attempted to cause, any such thing to be done.

(12) That said indictment is insufficient in that, so far as appears from said indictment, the alleged conspiracy was simply an agreement or plan to furnish to persons who had already in good faith made applications to purchase timber lands, and had honestly and truthfully and in good faith made the affidavits required of them by the statute, the moneys necessary to be paid by them for said lands, and then to have conveyances made by said entrymen and patent obtained therefor.

(13) That said indictment is insufficient in law in that it does not allege that said lands or any of them were mineral lands.

(14) That said indictment is insufficient in law in that it does not allege that any entryman, so entering timber lands, was not possessed of all the legal requirements required by law of persons

144 seeking to enter timber lands, there being no law making it illegal for a bona fide applicant for the purchase of timber lands, possessed of the required qualifications, after making his application and filing the required oath, to then, in advance of his entry or purchase, make any contract with any one else touching said land.

(15) That said indictment is indefinite, uncertain, and insufficient in law in that it charges this defendant and his codefendants with having conspired, combined, confederated, and agreed together "and with divers other persons to the said grand jury unknown," whereas the said indictment shows on its face that said statement as to said alleged other persons being unknown to the grand jury is not, and was not, true or correct.

(16) That said indictment is indefinite, uncertain, and insufficient in law in that it is not alleged how or by what way or method or means the defendant caused or procured the issuance by the United States of the patents, or any one or more of them, mentioned in paragraphs 58 to 68, inclusive, it not being alleged whether anything

was done by defendant within three years, or whether the issuance of the said patents was simply the formal act of the Government in pursuance of its approval of entries made more than three years prior thereto.

(17) The said indictment is indefinite, uncertain, and in-
145 sufficient in law in that the allegations as to lands alleged to have been obtained through one Henry Brown, to wit, the east half of the northwest quarter, and the south half of the northeast quarter of section 23, in township 34 north, range two west, N. M. P. M., are mentioned and described in the paragraph nineteen of the alleged overt acts, do not seem to be connected with the alleged conspiracy, yet charges are made in connection with said lands in the paragraphs of alleged overt acts numbered 19, 38, and 57.

(18) That said indictment is indefinite, uncertain, and insufficient at law in that paragraph 12 of the alleged overt acts, a tract of land is mentioned as containing one hundred and sixty (160) acres, when the description furnished in the same paragraph shows only one hundred and twenty (120) acres.

(19) That said indictment is indefinite, uncertain, and insufficient at law in that there is attempted to be described in paragraph 7 of the alleged overt acts, a tract of land lying in one body, which is stated to be the northeast quarter of the southeast quarter of section 35, the southeast quarter of the southeast quarter of section 26, and the west half of the southwest quarter of section 25, in township 36 north and range two and one-half west, reference being had to the New Mexico principal meridian, containing one hundred and sixty (160) acres; whereas, as appears from said indictment, no such
146 body of land could possibly exist, and the description is an impossible description, and one which describes no body of land which ever did or ever could exist.

(20) That said indictment is indefinite, uncertain, and insufficient at law in that there is attempted to be described in paragraph 4 of the alleged overt acts, an alleged tract of land, but said description is so uncertain and indefinite, that it cannot be told what tract of land is intended to be described.

(21) That said indictment is indefinite, uncertain, and insufficient at law in that there is attempted to be described in paragraph 16 of the alleged overt acts, an alleged tract of land of one hundred and sixty (160) acres, which description is an impossible description, and does not identify and could not identify any tract of land.

(22) That said indictment is indefinite, uncertain, and insufficient at law in that it is alleged in paragraph 56 of the alleged overt acts that defendants, at Pagosa Springs, in the District of Colorado, required one Mary C. Brown to execute a certain deed therein mentioned.

(23) That said indictment is indefinite, uncertain, and insufficient at law in that it is alleged in paragraph 44 of the alleged overt acts that defendants required one of the alleged entrymen to execute a

deed to the Hatcher Mercantile Company, and it is not alleged
147 that said alleged grantee took the title thereto in trust for the Pagosa Lumber Company, or held it in trust or for the benefit of said company, or that there was any intention to have said land so held, nor is there any statements as to in what way the said Pagosa Lumber Company did or could profit by said conveyance.

(24) That said indictment is insufficient in law in that it does not allege that the alleged conspiracy therein mentioned or attempted to be set forth, was formed within three years before the return or filing of the said indictment.

(25) That said indicement is insufficient in law in that it shows upon its face that the alleged conspiracy was formed more than three years before the return or filing of said indictment, which was on the 6th day of June, 1901, and that overt acts mentioned in paragraphs numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 20, 21, 22, 23, 24, 25, 26, 27, 28, 39, 40, 41, 42, 43, 44, 45, 46, and 47, are alleged to have been committed under and in pursuance of said conspiracy more than three years before the return of said indictment, all of said alleged overt acts being alleged to have been committed in the said year 1901.

(26) That said indictment shows on its face that the said prosecution against defendant, and said alleged offense, is barred by the statute of limitations of three years, in such cases made and provided.
148 (27) That said indictment is indefinite, uncertain, and insufficient in law in that it makes no charge or allegation that any unlawful conspiracy was formed at any time within three years prior to the return or filing of said indictment, but simply alleges that a conspiracy was formed, and overt acts committed, at times more than three years prior to the return of said indictment, and that at times within said period of three years the defendants did certain other overt acts.

(28) That said indictment is uncertain, indefinite, and insufficient in law in that there is no date fixed or stated or alleged in the said indictment within three years before the filing or return of the indictment, on which the alleged conspiracy was formed.

(29) That said indictment is uncertain, indefinite, and insufficient in law as to the date of the formation of the alleged conspiracy, in that it is simply alleged in general terms that the conspiracy has been a continuing conspiracy at all times since June 6th, 1901.

(30) That said indictment is insufficient in law in that it does not allege the existence of the alleged conspiracy at any particular time, or times, within three years from the return thereof, and does
149 not allege the conscious participation of the defendant therein within said three years.

(31) That said indictment is insufficient in law in that, while it alleges overt acts within three years of the return of the said indictment, it does not allege that within said three years defendant gave his consent or agreement to the continued existence and execution of said conspiracy.

(32) That said indictment is insufficient in law in that it does not state the names of the parties who formed a conspiracy within three years next before the return of said indictment, nor does it state, or attempt to state, the names of the persons who were connected with said conspiracy within said period of three years, nor does it state that the names of the persons, or any of the persons who formed the said alleged conspiracy within three years, or who were connected with it were, to the grand jury, unknown, but simply says that the conspiracy was formed on June 6th, 1901, by defendants with other persons to the grand jury unknown, and continued until the return of said indictment.

(33) That said indictment is insufficient in law in that it does not allege what the conspiracy, charged to exist within three years next prior to the return of said indictment, consisted of or was, or the means or method that was, or were, to be adopted to carry
150 out the same, save and except by reference to an alleged conspiracy said to have existed more than three years prior to the return of said indictment, and which alleged offense was and is barred by the statute of limitations of three years.

(34) That said indictment is indefinite, uncertain, and insufficient in charging any offense to have been committed within three years before the filing of said indictment in that the said indictment shows on its fact that the alleged plan of the alleged conspirators, by which said alleged conspiracy was to be carried out, could not have been adopted within said period of three years, because said indictment alleges that, as to large numbers of the tracts of land mentioned in the said indictment, the things alleged to have been planned had been carried out more three years before the return of said indictment, and therefore could not have been a part of any plan or conspiracy adopted within said period of three years.

(35) That said indictment is indefinite, uncertain, and insufficient in law in that it is not alleged that defendants, or any of them, at any place within the district of Colorado, conspired, confederated, or agreed to do anything whatever within the period of three years next before the return of said indictment, there being no allegation whatever as to the place of the conspiracy, or the agreement to co-
151 operate, or of any acquiescence in said conspiracy in said period of three years, and, so far as appears from said indictment, no one of the defendants may have been in the district of Colorado within said period of three years.

(36) That said indictment is insufficient in law and void for duplicity in that it charges against defendant the formation of an unlawful conspiracy on, to wit, June 6th, 1901, and the doing of overt acts mentioned in paragraphs numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 20, 21, 22, 23, 24, 25, 26, 27, 28, 39, 40, 41, 42, 43, 44, 45, 46, and 47, and also charges the defendant in the same count with the crime of conspiracy committed at a time within three years next prior to June 22, 1907, and the doing thereunder of overt acts mentioned in paragraphs 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, and

68, thereby embracing in one count two charges, or offenses, of conspiracy, and overt acts under each charge.

(37) The defendant, in support of, and as a part of, his motion to dismiss the cause and quash the indictment, because the indictment was not found or returned within three years next after the alleged offense was committed, and in support of his claim that the prosecution against defendant is barred by the statute of limitations,
152 further says: That during all of the times mentioned in the indictment, and at the time first mentioned, to wit, June 6th, 1901, and ever since that time, the defendant has been a citizen and resident of the State of Colorado, and has, during said entire period of time, resided and lived and actually been in the State of Colorado, and he has never been a fugitive from justice in any way, nor has he ever, at any time, fled from justice, and that his whereabouts in the State of Colorado have never been concealed and were well known to the people of the State of Colorado and the prosecuting officers of the United States Government. And defendant further says that he has never, at any time, left the district for the purpose of avoiding arrest, and he could have been easily apprehended or arrested had any indictment been found against him at any time since said 6th day of June, 1901. He further states that no information or criminal complaint of any kind was filed against him, and that he was not arrested until after the return of the indictment, in this cause, which was returned on the 22nd day of June, 1907.

(38) That the indictment should be quashed for the further reason, as defendant alleges the facts to be, that the grand jurors by whom said indictment was made or presented were not regularly or legally summoned, empaneled, and sworn as required by the
153 laws of the United States governing such procedure in this, to wit: At the May term of this court on the day of , 1907, a grand jury was ordered to be summoned from certain counties named in the order, and the clerk of this court, in the presence of the marshal of this court, was ordered to draw by chance from the jury box the names of twenty-three persons, residents of the counties of Colorado, named in said order, and to summon them to appear on Tuesday, the 14th day of May, 1907, at ten o'clock a. m., under a venire facias made returnable on that day. Thereupon the names of twenty-three persons were drawn by the clerk, such names being fully set forth in the records of this court, at page 350.

Thereafter, and on the 14th day of May, 1907, the United States marshal of the district of Colorado, made return of the venire facias aforesaid, showing that thereunder he had summoned twenty-one men to serve as grand jurors. That the twenty-one individuals so summoned appeared on the return day aforesaid, and for good and sufficient reasons to the court appearing, seven of said number were excused further attendance upon the court at that term, leaving less than sixteen, to wit, fourteen, of the individuals originally summoned. Thereafter, upon these facts appearing to the court, a special venire facias was issued on said day, commanding the marshal to summon seven good and lawful men to attend and serve as grand jurors until

discharged, which said venire facias was made returnable on
154 the 14th day of May, at two o'clock p. m. That thereafter the marshal of this court, under said special venire facias, without drawing further names from the box, summoned from the city and county of Denver seven men, whose names appear at page 415 of the records of this court. That the summoning of said seven individuals under the special venire facias was contrary to law and the rules of this court. That the seven individuals so summoned appeared, were duly sworn and empaneled with the fourteen of the original panel, and the twenty-one individuals so summoned, impaneled, and sworn constituted the grand jury which returned the indictment herein.

RICHARDSON & HAWKINS,
Attorneys for Defendant.

STATE OF COLORADO,
County of Archuleta, ss:

Alexander T. Sullenberger, being first duly sworn, upon oath deposes: That he is the defendant above named. That he has heard read the foregoing motion, and that the statements of facts therein made and contained are true of his own knowledge.

ALEXANDER T. SULLENBERGER.

Subscribed and sworn to before me this the 18th day of November, 1907.

M. O. LANGWORTHY,
Clerk District Court.

(Seal District Court Archuleta County)

(Endorsed:) No. 2029. United States of America, District of Colorado, ss. In the United States District Court, sitting at Denver. The United States of America versus Alexander T. Sullenberger, James S. Hatcher, Ellis M. Hampton, Eph K. Caldwell, Robert E. Sloan, and Eudolphus M. Taylor, defendants. Motion of defendant Alexander T. Sullenberger to quash indictment, etc. Filed Nov. 23, 1907. Charles W. Bishop, clerk. Richardson & Hawkins, attorneys for defendants, 401 to 407 Ernest & Cranmer Building, Denver, Colo.

155 Twenty-fifth day, November term, Wednesday, December 4th, A. D. 1907.

Present: The Honorable Robert E. Lewis, district judge, and other officers as noted on the fifth day of November, A. D. 1907.

THE UNITED STATES OF AMERICA *vs.* ALEXANDER T. SULLENBERGER, JAMES S. HATCHER, ELLIS M. HAMPTON, EPH K. CALDWELL, ROBERT E. SLOAN, and EUDOLPHUS M. TAYLOR.	2029. Indictment for conspiracy.

At this day comes Ernest Knaebel, esquire, assistant to the Attorney-General, who prosecutes the pleas of the United States in this

behalf, and the defendants Alexander T. Sullenberger, James S. Hatcher, and Robert E. Sloan, by Horace N. Hawkins, esquire, their attorney, and the defendants Ellis M. Hampton, Eph K. Caldwell, and Eudolphus M. Taylor, by Frank C. Goudy, esquire, their attorney, also come.

And the several motions of the defendants to quash the indictment herein coming on now to be heard, are argued by counsel to the hour of adjournment.

Twenty-sixth day, November term, Thursday, December 5th, A. D. 1907.

Present: The Honorable Robert E. Lewis, district judge, and other officers as noted on the fifth day of November, A. D. 1907.

	THE UNITED STATES OF AMERICA *vs.* ALEXANDER T. SULLENBERGER, JAMES S. HATCHER, ELLIS M. HAMPTON, EPH K. CALDWELL, ROBERT E. SLOAN, and EUDOLPHUS M. TAYLOR.	029. Indictment for conspiracy.
156		

At this day comes Ernest Knaebel, esquire, assistant to the Attorney-General, who prosecutes the pleas of the United States in this behalf, and the defendants, Alexander T. Sullenberger, James S. Hatcher, and Robert E. Sloan, by Horace N. Hawkins, esquire, their attorney, and the defendants, Ellis M. Hampton, Eph. Caldwell, and Eudolphus M. Taylor, by Frank C. Goudy, esquire, their attorney, also come.

And the several motions of the defendants to quash the indictment herein, coming on now to be heard, are argued by counsel and by the court taken under advisement.

Thirtieth day, November term, Tuesday, December 10th, A. D. 1907.

Present: The honorable Robert E. Lewis, district judge, and other officers as noted on the fifth day of November, A. D. 1907.

	THE UNITED STATES OF AMERICA *vs.* ALEXANDER T. SULLENBERGER, James S. Hatcher, Ellis M. Hampton, Eph K. Caldwell, Robert E. Sloan, and Eudolphus M. Taylor.	2029. Indictment for conspiracy.
157		

At this day comes Ernest Knaebel, esquire, assistant to the Attorney-General, who prosecutes the pleas of the United States in this behalf, and the defendants, Ellis M. Hampton, Eph K.

Caldwell, and Eudolphus M. Taylor, by Charles H. Redmond, esquire, their attorney, also come. And thereupon, on motion of the said defendants;

It is ordered by the court that they may amend their several motions to quash the indictment herein, by interlineation, instanter, which is accordingly done.

Thirty-eighth day, November term, Tuesday, December 24th, A. D. 1907.

Present: The honorable Robert E. Lewis, district judge, and other officers as noted on the fifth day of November, A. D. 1907.

THE UNITED STATES OF AMERICA *vs.* ALEXANDER T. SULLENBERGER, James S. Hatcher, Ellis M. Hampton, Eph K. Caldwell, Robert E. Sloan, and Eudolphus M. Taylor.	2029.	Indictment for conspiracy.

At this day comes Ralph Hartzell, esquire, assistant district attorney, who prosecutes the pleas of the United States in this behalf, and the defendants, by Horace N. Hawkins, esquire, and Frank C. Goudy, esquire, their attorney, also come. And the several motions of the defendants, Alexander T. Sullenberger, James S. Hatcher, and Robert E. Sloan, and of the defendants, Ellis M. Hampton, Eph K. Caldwell,
158 and Eudolphus M. Taylor, to quash the indictment, having heretofore come on to be heard, and having been argued by Ernest Knaebel, esquire, assistant to the Attorney-General, and by Horace N. Hawkins, esquire, attorney for the defendants, Alexander T. Sullenberger, James S. Hatcher, and Robert E. Sloan, and by Frank C. Goudy, esquire, attorney for the defendants, Ellis M. Hampton, Eph K. Caldwell, and Eudolphus M. Taylor, and having been taken under advisement, and the court having considered the same and being now fully advised in the premises;

It seemeth to the court now here that the indictment herein is not sufficient in law to be answered unto, and so the said motions, and each thereof, be, and the same are hereby, granted, and that the indictment herein be, and the same is hereby, quashed.

To which order and ruling of the court the plaintiff excepts and an exception is hereby allowed to it.

Forty-sixth day, November term. Monday, January 6th, A. D. 1908.

Present: The Honorable Robert E. Lewis, district judge, and other officers as noted on the fifth day of November, A. D. 1907.

The United States of America *vs.* Alexander T. Sullenberger, James S. Hatcher, Ellis M. Hampton, Eph K. Caldwell, Robert E. Sloan, and 159 Endolphus M. Taylor.	2029.	Indictment for conspiracy.

At this day comes Ernest Knaebel, esquire, special assistant to the Attorney-General, who prosecutes the pleas of the United States in this behalf, and the defendants by Frank C. Goudy, esquire, and Horace N. Hawkins, esquire, their attorneys, also come. And it now appearing to the court that the order heretofore, and on the twenty-fourth day of December, A. D. 1907, at this same term, entered herein is erroneous, it is ordered by the court that said order be, and the same is hereby, vacated, set aside, and for naught held, and that the following stand in the place and stead thereof, to wit:

It is now ordered that, for the reasons and upon the grounds stated in the opinions filed in this cause and cause number 2028 in this court, on the twenty-fourth day of December last, the motions of the defendants to quash the indictment, including the defenses, therein set up based upon the statute of limitations (the legal sufficiency of which defenses in substance admitting the matters of fact therein alleged was drawn in question by the plaintiff at the argument), be, and they hereby are, sustained.

It is further ordered that, for the reasons and grounds aforesaid, set forth in the said opinions, the indictment in this cause be, and the same hereby is, quashed.

160 Wherefore it is considered, ordered, and adjudged by the court that the defendants of and from the premises in this said indictment specified be discharged and go hence hereof without day.

It is further ordered by the court that if the United States shall sue out a writ of error to the Supreme Court of the United States from this order and judgment, the defendants shall each enter into a personal recognizance before an United States commissioner in the sum of one thousand dollars ($1,000) conditioned that he shall personally appear in this court on the first day of the next term thereof at Denver and from day to day and from term to term thereafter and answer the indictment herein if the judgment herein shall be reversed by the said Supreme Court. And until such recognizances shall have been duly executed and filed with the clerk of this court the existing recognizances now on file in this case shall be and remain binding upon the defendants and their respective sureties.

To which order and judgment sustaining the said demurrers and quashing the said indictment the plaintiff then and there, at the time thereof, excepted, and an exception was allowed to it.

161 In the District Court of the United States within and for the District of Colorado.

UNITED STATES OF AMERICA,
District of Colorado, ss:

UNITED STATES OF AMERICA, PLAINTIFF, *vs.* ALEXANDER T. SULLENBERGER, JAMES S. HATCHER, ELLIS M. HAMPTON, EPH K. CALDWELL, ROBERT E. SLOAN, and EUDOLPHUS M. TAYLOR, defendants.	No. 2029.

Bill of exceptions.

Be it remembered that on the 20th day of November, 1907, the defendants, Ellis M. Hampton, Eph K. Caldwell, and Eudolphus M. Taylor, filed in this cause their several and respective verified motions to quash the indictment herein, and on the 23rd day of November, 1907, the defendants, Alexander T. Sullenberger, James S. Hatcher, and Robert E. Sloan, filed in this cause their several and respective verified motions to quash the indictment herein, in each of which motions was included and alleged among other defenses the special affirmative defense of the defendant so filing the same, setting up the statute of limitations (Revised Statutes, section 1044) as a bar to the prosecution, in connection with verified affirmative allegations, in substance and effect averring that such defendant was not and had not been a person fleeing from justice within the meaning of
162 the exception to that statute provided by section 1045 of the Revised Statutes. Afterwards, on the 10th day of December, 1907, the said defendants, Hampton, Taylor, and Caldwell, pursuant to permission of the court then granted, amended their said several respective motions by interlining the words " of the southeast quarter " immediately before the words " of section 26," where the latter phrase appears in paragraphs numbered 19 of the three motions last aforesaid, and no other amendment of any of said motions was ever made. All of which said several respective motions of the defendants, including the said amendments of those which were amended as aforesaid, together with the aforesaid special defenses so with the said motions alleged as aforesaid, are set forth in words and figures in the transcript of the record proper of this cause at pages 52 to 155 of such transcript, as the said transcript is prepared and will be duly certified to the Supreme Court pursuant to the writ of error to be sued out by the United States for the review of the

judgment and decision herein in that court; and in lieu of setting forth the said motions, so amended, with the aforesaid special defences, at large here in this bill of exceptions reference is hereby made to that part of the said transcript where they so appear, and the same are by this reference taken and considered as a part of this bill of exceptions as though here fully extended.

And on the 4th of December, 1907, before the court, Hon. Robert E. Lewis, district judge, presiding, and Horace N. Hawkins, esquire, appearing as counsel for the defendants, Alexander T. Sullenberger, James S. Hatcher, and Robert E. Sloan, and Frank C. Goudy, esquire, as counsel for the defendants, Eudolphus M. Taylor, Eph K. Caldwell, and Ellis M. Hampton, and Ernest Knaebel, special assistant to the Attorney-General, appearing for the United States, this cause came on to be heard upon the indictment herein, the said
163 motions to quash the same and the said special defenses thereto, and was argued by counsel, the truth of the said affirmative allegations of fact alleged as aforesaid in connection with the said special defenses to show that the respective defendants had not been fugitives from justice being admitted, but the legal sufficiency in substance of such defenses being drawn in question by the counsel for the United States at the argument; and thereafter, and on the 24th day of December, 1907, the said court made its decision and order upon the matters so heard and argued, granting the said motions and sustaining the said special defenses, and quashing the said indictment, upon the ground and for the reasons, and those only, set forth in two written opinions then filed by the court, one in this cause and the other in cause number 2028 in the said court, entitled The United States *v.* Edgar M. Biggs and others, which opinions are respectively, in words and figures as follows, that is to say:

164 In the District Court of the United States for the District of Colorado.

UNITED STATES OF AMERICA, PLAINTIFF, *v.* ALEXANDER T. SULLENBERGER ET AL., DEFENDANTS.	No. 2029. R. S. U. S., sec. 5440.

The indictment in this case charges that the defendant Sullenberger and his five codefendants on June sixth, nineteen hundred and one, and at the several times of the committing of the several overt acts hereinafter in this indictment mentioned and continuously at all times between the said sixth day of June, in the year last aforesaid, and the day of the presenting of this indictment, at Durango aforesaid, in the said district, unlawfully, corruptly, wickedly, and maliciously did conspire, combine, confederate, and agree together and with divers other persons to the said grand jurors unknown indirectly to obtain from the said United States, for a certain corporation, to wit, the Pagosa Lumber Company, a large quantity of land, to wit, two thousand nine hundred and ninety (2,990) acres of timber lands, in excess of the quantity of such lands which the said corpora-

tion could lawfully obtain directly from the said United States, which were subject to entry and sale as timber lands under the laws of the United States and the regulations theretofore made by the Commissioner of the General Land Office. Descriptions of said lands being found in the several overt acts wherein the defend-
165 ants are charged with procuring the execution of certain documents, each entitled "Testimony of claimant," by certain persons named in those documents for presentation to the register in connection with the entry of the same lands by those persons in quantities allowed to them respectively by law, being overt acts one to eighteen, both inclusive.

The indictment then charges that said timber lands were to be obtained as aforesaid by the defendants soliciting and procuring the persons aforesaid (supposedly those named as being unknown to the grand jurors) for hire and under agreement with them separately to that end to pay to the receiver of the said land office, with moneys to be furnished to them by said corporation, the price fixed by law therefor, make entries as individual entrymen at the land office aforesaid with the said register of tracts of such lands in quantities respectively not exceeding the quantities allowed by the said laws and regulations, secure patents from the said United States for the said lands to themselves as such entrymen, and make conveyances of the title to the said lands to the said corporation.

The first overt act charges that defendant Sullenberger on June 6th, 1901, by solicitation and promise of reward in some small sum of money, the amount being unknown to the grand jurors, did induce and procure one Meuser to execute and verify by his oath before the register a certain document entitled "Testimony of claim-
166 ant" for presentation to the register in connection with the entry by the said Meuser of the one hundred and sixty acres of land there described.

The second overt act is a like charge against the defendant Sullenberger of date June 17th, 1901, in procuring a like document from one Melrose.

The third overt act is a like charge against defendants Sloan and Taylor of date June 20th, 1901, in procuring a like document from one Pedro Delgado.

The fourth overt act is a like charge against the defendant Hatcher in procuring a like document from one Wheatland of date June 8th, 1901.

The fifth overt act is a like charge against the defendant Hatcher in procuring a like document from one Helena Hersch of date August 6th, 1901.

The sixth overt act is a like charge against the defendant Hatcher in procuring a like document from one Henrietta Hatcher of date August 6th, 1901.

The seventh overt act is a like charge against the defendant Hatcher in procuring a like document from one Anderson of date August 6th, 1901.

The eighth overt act is a like charge against defendants Sullenberger, Caldwell, and Hatcher in procuring a like document from one Fitzhugh of date September 19th, 1901.

167 The ninth overt act is a like charge against defendants Sullenberger and Hatcher in procuring a like document from one Kimball of date September 20th, 1901.

The tenth overt act is a like charge against the defendants Hampton and Caldwell in procuring a like document from one Loucks of date September 5th, 1904.

The eleventh overt act is a like charge against the defendant Hatcher in procuring a like document from one Keith of date July 31st, 1906.

The twelfth overt act is a like charge against the defendant Hampton in procuring a like document from one Howe of date August 15th, 1906.

The thirteenth overt act is a like charge against the defendant Hampton in procuring a like document from one Mullins of date August 17th, 1906.

The fourteenth overt act is a like charge against the defendants Sullenberger and Hampton and Caldwell in procuring a like document from one Martinez of date September 24th, 1906.

The fifteenth overt act is a like charge against the defendant Hampton in procuring a like document from one Shields of date October 22nd, 1906.

The sixteenth overt act is a like charge against the defendant Hampton in procuring a like document from one Jessie

168 V. Shields of date October 23rd, 1906.

The seventeenth overt act is a like charge against the defendant Hampton in procuring a like document from one Eva. A. Everett of date October 23rd, 1906.

The eighteenth overt act is a like charge against the defendant Hampton in procuring a like document from one Mary C. Brown of date October 25th, 1906.

The nineteenth overt act is a like charge against the defendant Hatcher in procuring a like document from one Henry Brown of date October 26th, 1906.

The twentieth overt act charges that the defendant Sloan, on June 6th, 1901, did furnish said Meuser the sum of $400 to make payment to the receiver of the price fixed by law for timber lands so entered by him.

The twenty-first overt act is a like charge against defendants Sloan and Sullenberger in furnishing a like amount to one Melrose to make payment for the timber lands entered by him, of date June 17th, 1901.

The twenty-second overt act is a like charge against defendant Sloan, of date June 20th, 1901, in furnishing a like amount to said Delgado to pay for timber lands so entered by him.

168 The twenty-third overt act is a like charge against the defendant Caldwell, of date June 8th, 1901, in furnishing a like

amount to one Wheatland to make payment for the timber lands so entered by him.

The twenty-fourth overt act is a like charge against defendant Hatcher, of date August 6th, 1901, in furnishing a like amount to Helena Hersch to make payment for the timber lands so entered by her.

The twenty-fifth overt act is a like charge against the defendant Hatcher, of date August 6th, 1901, in furnishing a like amount to Henrietta Hatcher to make payment for the timber lands so entered by her.

The twenty-sixth overt act is a like charge against the defendant Sullenberger, of date August 7th, 1907, in furnishing a like amount to one Anderson to make payment for the timber lands so entered by him.

The twenty-seventh overt act is a like charge against defendant Caldwell, of date September 19th, 1901, in furnishing a like amount to one Fitzhugh to make payment for the timber lands so entered by him.

The twenty-eighth overt act is a like charge against the defendant Sullenberger, of date September 20th, 1901, in furnishing a like amount to one Kimball to make payment for the timber lands so entered by him.

170 The twenty-ninth overt act is a like charge against defendant Hampton, of date September 5th, 1904, in furnishing a like amount to one Loucks to make payment for the timber lands so entered by him.

The thirteenth overt act is a like charge against the defendant Hatcher, of date July 31st, 1906, in furnishing a like amount to one Keith to make payment for the timber lands so entered by him.

The thirty-first overt act is a like charge against the defendant Hampton, of date August 15th, 1906, in furnishing a like amount to one Howe to make payment for timber lands so entered by him.

The thirty-second overt act is a like charge against the defendant Hampton, of date August 17th, 1906, in furnishing a like amount to one Mullins to make payment for timber lands so entered by him.

The thirty-third overt act is a like charge against the defendant Hampton, of date September 24th, 1906, in furnishing the sum of $300 to one Martinez to make payment for the timber lands so entered by him.

The thirty-fourth overt act is a like charge against defendant Hampton, of date October 22nd, 1906, in furnishing the sum of

171 $400 to one Shields to make payment for the timber lands so entered by him.

The thirty-fifth overt act is a like charge against the defendant Hampton, of date October 23rd, 1906, in furnishing a like amount to one Jessie V. Shields to make payment for the timber lands so entered by her.

The thirty-sixth overt act is a like charge against the defendant Hampton, of date October 23rd, 1906, in furnishing a like amount

to one Eva A. Everett to make payment for the timber lands so entered by her.

The thirty-seventh overt act is a like charge against the defendant Hatcher, of date October 25th, 1906, in furnishing a like amount to Mary C. Brown to make payment for the timber lands so entered by her.

The thirty-eighth overt act is identical with the thirty-seventh, except October 26th, 1906, is given as the date instead of October 25th.

The thirty-ninth overt act charges that the defendants on June 1st, 1901, did require and procure said Meuser to sign and execute a certain deed of conveyance conveying the title to the lands entered by him to said corporation, the Pagosa Lumber Company.

The fortieth overt act is a like charge against the defendants
172 of date September 1st, 1901, in procuring a like deed from said Melrose.

The forty-first overt act is a like charge against the defendants of date July 1st, 1901, in procuring a like deed from said Delgado.

The forty-second overt act is a like charge against the defendants of date September 1st, 1901, in procuring a like deed from said Wheatland.

The forty-third overt act is a like charge against the defendants of date August 14th, 1901, in procuring a like deed from said Helena Hersch.

The forty-fourth overt act is a like charge against the defendants of date August 14th, 1901, in procuring a like deed from Henrietta Hatcher.

The forty-fifth overt act is a like charge against the defendants of date August 7th, 1901, in procuring a like deed from said Charles Anderson.

The forty-sixth overt act is a like charge against the defendants of date September 1st, 1901, in procuring a like deed from said Fitzhugh.

The forty-seventh overt act is a like charge against the defendants of date October 26th, 1901, in procuring a like deed from said Kimball.

The forty-eighth overt act is a like charge against the
173 defendants of date October 1st, 1904, in procuring a like deed from said Loucks.

The forty-ninth overt act is a like charge against the defendants of date October 26th, 1906, in procuring a like deed from said Keith.

The fiftieth overt act is a like charge against the defendants of date November 15th, 1906, in procuring a like deed from said Ruby A. Howe.

The fifty-first overt act is a like charge against the defendants of date September 4th, 1906, in procuring a like deed from said Mullins.

The fifty-second overt act is a like charge against the defendants of date September 24th, 1906, in procuring a like deed from said Martinez.

The fifty-third overt act is a like charge against the defendants of date November 14th, 1906, in procuring a like deed from said Grant Shields.

The fifty-fourth overt act is a like charge against the defendants of date November 14th, 1906, in procuring a like deed from said Jessie V. Shields.

The fifty-fifth overt act is a like charge against the defend-
174 ants of date November 14th, 1906, in procuring a like deed from Eva A. Everett.

The fifty-sixth overt act is a like charge against the defendants of date November 13th, 1906, in procuring a like deed from said Mary C. Brown.

The fifty-seventh overt act is a like charge against the defendants of date of November 13th, 1906, in procuring a like deed from said Henry Brown.

The fifty-eighth overt act charges that the defendants on May 5th, 1905, at the City of Washington, D. C., unlawfully did cause and procure the issuance by the said United States of a patent to the lands described in overt act number 1, running to the said Charles E. Meuser, entryman thereof, as in that overt act set forth.

The fifty-ninth overt act is a like charge and of the same date last aforesaid, in procuring a patent to issue to said Melrose.

The sixtieth overt act is a like charge to the last in procuring a patent to issue to said Delgado.

The sixty-first overt act is a like charge in procuring a patent to issue to said Wheatland.

The sixty-second overt act is a like charge in procuring a patent to issue to said Helena Hersch.

The sixty-third overt act is a like charge in procuring a patent to issue to said Henrietta Hatcher.

175 The sixty-fourth overt act is a like charge of date June 30th, 1905, in procuring a patent to issue to said Charles Anderson.

The sixty-fifth overt act is a like charge, of date May 5th, 1905, in procuring a patent to issue to said Roy W. Fitzhugh.

The sixty-sixth overt act is a like charge in procuring a patent to issue to said Kimball.

The sixty-seventh overt act is a like charge of date May 29th, 1905, in procuring a patent to issue to said Loucks.

The sixty-eighth overt act is a like charge of date December 17th, 1906, in procuring a patent to issue to said Mullins.

The indictment then concludes, as though intended as a part of the charging part thereof, to the effect that the defendants on the said sixth day of June, in the year nineteen hundred and one, and from thence hitherto at the several times of the committing of the said several overt acts in this indictment charged (the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement during all the time from the said day when the same was originally entered into, to wit, the said sixth day of June in the year nineteen hundred and one to the date of the presenting

of this indictment being still continuing and in existence) in
176 manner and form in this indictment aforesaid, did unlawfully, etc., conspire, etc., fraudulently to obtain from the said United States for the said corporation public lands and property of the United States in quantity greatly in excess of the quantity which the said corporation could lawfully obtain directly from the United States under a proper and lawful administration of the said laws and regulations, and in that manner defraud the United States of its valuable property in such lands and also of its governmental function in preserving and disposing of the same, and also out of its right to administer an intelligent and honest service in that behalf.

It is evident that the certain documents referred to in the charging part of the indictment as "Testimony of claimant," and again in overt acts one to nineteen, both inclusive, has reference to an affidavit required by the land office officials when the claimant appeared at the land office after the sixty days publication, as provided in section 3 of the act. Indeed, this was not denied by counsel for the Government on argument. It is nowhere charged that these affidavits (testimony of claimant) were false and untrue.

It is necessary to consider not only sec. 5440, but also the act of June 3rd, 1878, as amended August 4th, 1892, commonly known as the timber and stone act.

177 To this indictment motions to quash have been interposed.

I.

Aside from what was said about the Barth deed in case No. 2028, United States v. Biggs et. al., the same principles applied in that case are applicable here, and for the reasons there given this indictment is bad.

The motions to quash are sustained.

December 24th, 1907.

ROBT. E. LEWIS,
District Judge.

* * * * * * *

202½ To which action, decision, and order of the court, granting the said motions and sustaining the said special defenses, and quashing the said indictment for the reasons and upon the grounds aforesaid, the United States by its counsel then and there duly excepted.

And thereafter, on the 6th day of January, 1908, the said court made and entered its final order and judgment in this cause, pursuant to the said decision and based upon the reasons and grounds in the said opinions set forth, and upon the said reasons and grounds granting the said motions, sustaining the said special defenses, quashing the said indictment, and adjudging that the defendants, of and from

the premises in the indictment specified, be discharged and go hence without day.

To which order and judgment of the court, and to each and every part thereof, and particularly to those parts thereof, upon the reasons and grounds aforesaid, granting the said motions, sustaining the said special defenses, quashing the said indictment, and adjudging that the defendants, of and from the premises in the indictment specified, be discharged and go hence without day, the United States by its counsel then and there duly excepted.

And forasmuch as the foregoing matters do not appear of record, the plaintiff tenders this its bill of exceptions, and prays that the same may be signed and duly authenticated and made part of the record herein, which is accordingly done this 21st day of January, 1908.

ROBT. E. LEWIS,
District Judge.

Service of the foregoing bill of exceptions was made upon us this 20th day of January, 1908.

RICHARDSON & HAWKINS,
Attorneys for the defendants, Alexander T. Sullenberger, James S. Hatcher, and Robert E. Sloan.

202½ GOUDY & TWITCHELL,
Attorneys for the defendants, Ellis M. Hampton, Eph. K. Caldwell, and Eudolphus M. Taylor.

(Endorsed:) No. 2029. In the U. S. District Court. United States of America, plaintiff, vs. Alexander T. Sullenberger, James S. Hatcher, Ellis M. Hampton, Eph. K. Caldwell, Robert E. Sloan, and Eudolphus M. Taylor, defendants. Bill of exceptions. Filed Jan. 21, 1908. Charles W. Bishop, clerk. Earl M. Cranston, U. S. attorney, for the Dist. of Colo.

203 In the District Court of the United States within and for the District of Colorado.

UNITED STATES OF AMERICA,
District of Colorado, ss:

THE UNITED STATES OF AMERICA, PLAINTIFF,
v.
ALEXANDER T. SULLENBERGER, JAMES S. HATCHER, Ellis M. Hampton, Eph. K. Caldwell, Robert E. Sloan, and Eudolphus M. Taylor, defendants. } No. 2029.

Petition for writ of error.

And comes now the United States, plaintiff herein, and says that on the 24th day of December, 1907, this court made its decision sustaining the special pleas of the defendants and quashing and setting aside the indictment in this cause, and that thereafter, and on the 6th day of January, 1908, this court, pursuant to that decision,

entered judgment herein in favor of the defendants and against this plaintiff, in which judgment and decision certain errors were committed to the prejudice of this plaintiff, and of such a character as to entitle this plaintiff, under the law, to review the said judgment and decision in the Supreme Court of the United States by writ of error, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, this plaintiff prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of the errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the said Supreme Court.

204 RALPH HARTZELL,
Ass't and Acting United States Attorney
for the District of Colorado.
ERNEST KNAEBEL,
Special Assistant to the Attorney-General,
Attorneys for Plaintiff.

UNITED STATES OF AMERICA,
District of Colorado, ss:

Upon reading and filing the foregoing petition and the assignment of errors therein referred to, it is ordered that the petition be, and the same hereby is, allowed and that a writ of error as therein prayed be issued by the clerk of the Circuit Court for this district under the seal of such Circuit Court, pursuant to section 1004 of the Revised Statutes.

Dated, Denver, Colorado, January 22nd, 1908.

ROBT. E. LEWIS,
District Judge.

(Endorsed:) No. 2029. United States District Court, District of Colorado. The United States of America, plaintiff, v. Alexander T. Sullenberger et al., defendants. Petition for writ of error and order allowing writ. Filed Jan. 22, 1908. Charles W. Bishop, clerk.

205 In the District Court of the United States within and for the District of Colorado.

UNITED STATES OF AMERICA,
District of Colorado, ss:

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
ALEXANDER T. SULLENBERGER, JAMES S. HATCHER, ELLIS M. HAMPTON, EPH. K. CALDWELL, ROBERT E. SLOAN, and EUDOLPHUS M. TAYLOR, defendants. | No. 2029.

Assignment of errors.

Comes now the United States of America, plaintiff in the above-entitled cause, and files this assignment of errors, upon which it will

rely in the prosecution of the writ of error to be sued out by it for review by the Supreme Court of the judgment heretofore entered by the District Court for the District of Colorado in the above-entitled cause, to wit:

First. The District Court for the District of Colorado erred in quashing the indictment in the above-entitled cause.

Second. The said District Court erred in sustaining the motions of the defendants to quash the indictment in said cause.

Third. The said District Court erred in overruling the demurrer of the United States, interposed ore tenus at the time of the argument, and questioning the legal sufficiency as to substance of the special pleas of the defendants, interposed by them in and with
206 their respective motions to quash the indictment and setting up the statute of limitations as a bar to the prosecution, and in sustaining the said special pleas in bar, none of the defendants having ever been put in jeopardy in the cause or for the offense charged.

Fourth. The said District Court erred in construing section 5440 of the Revised Statutes, as amended by the act of May 17, 1879 (21 Stat. L., page 4), in effect so as to limit and restrain the operation of that section (so amended) to conspiracies to commit substantive criminal offenses against the United States, and conspiracies to defraud the United States by means necessarily involving the commission of substantive criminal offenses against the United States, and in sustaining the motions of the defendants to quash the indictment and in quashing the indictment upon the basis of such erroneous construction of said statute.

Fifth. The said District Court erred in construing section 5440 of the Revised Statutes (as so amended) as inapplicable to conspiracies such as the conspiracy aptly described in the said indictment, wherein and whereby the conspirators intend and agree to procure indirectly from the United States for a corporation numerous tracts of the public timber lands of the United States, susceptible of entry under the act of June 4, 1878 (20 Stat. L., 91), commonly called the timber and stone act, by inducing and procuring numerous other persons to make entry and purchase of said tracts, severally and respectively, each in his own name and ostensibly for his own use and benefit, but each in fact pursuant to an intention on his part and an antecedent agreement with the conspirators, to enter and purchase the land from
207 the United States for the use of such corporation with moneys to be furnished by it, and to deed the land to the corporation after entry, all in consideration of some small sum of money to be paid to him by the conspirators under such agreement between him and them; and in sustaining the motions of the defendants to quash the indictment, and in quashing the indictment, upon the basis of such erroneous construction of the said statute.

Sixth. The said District Court erred in its construction of Revised Statutes, sec. 5440 (as so amended), in holding that each act done by a party to any conspiracy denounced thereby, and done to effect the

object of such conspiracy, completes a separate and distinct offense under the said section in such a sense that an indictment, such as the indictment in this cause, charging such conspiracy, and, in the same count, more than one act so done to effect the object thereof, is vicious for duplicity, and in sustaining the said motions of the defendants to quash the indictment, and in quashing the said indictment partly upon and because of such erroneous construction.

Seventh. The said District Court erred in its view and construction of sec. 5440 of the Revised Statutes (as so amended) in this, to wit: In holding, in substance and effect, that the word "conspire" in said section respects only the act of reaching the original unlawful consensus and agreement among and between the conspirators, and not also the subsequent continued adherence to, and participation in, such consensus and agreement by the conspirators; and in further holding, upon the basis of that erroneous interpretation of the word "conspire," that the offense in the said indictment charged was
208 barred by the statute of limitations (Rev. Stat., sec. 1044), because it appeared upon the face of the said indictment that acts to effect the object of the conspiracy therein described were done by parties to the conspiracy after its original formation, and more than three years prior to the return of the indictment, and because it was further shown by the allegations of fact, contained in the special pleas below mentioned, and admitted to be true by the United States at argument, that the defendants were not fugitives from justice, although the indictment expressly charges and shows that the accused and others were in continuous, unlawful agreement, and conspiracy from a time certain preceding the performance of the first act charged as done to effect its object to the time of the return of the indictment, and that other acts, done by parties to the conspiracy to effect the object thereof, were done at times within the three years next preceding the return of the indictment; and the said District Court, acting upon the said erroneous statutory interpretation and construction in this specification mentioned, further erred in overruling the objections, amounting, in legal effect, to demurrers ore tenus, made at argument by the United States to the special pleas of the defendants, setting up the statute of limitations in bar of the prosecution, and alleged in connection with, and as though parts of, their respective motions to quash the indictment, and in thereupon sustaining the said special pleas, quashing the said indictment, and rendering judgment for the defendants, none of the defendants having ever been put in jeopardy in the cause or for the offense charged.

Eighth. The said District Court erred in rendering judg-
209 ment for the defendants based upon the erroneous constructions and interpretations of section 5440 of the Revised Statutes (as amended), which are described and indicated in the fourth, fifth, sixth, and seventh specifications of this assignment of errors.

Ninth. The said District Court erred in holding that section 5440 of the Revised Statutes (as amended), taken in connection with the said timber and stone act, did not apply to the facts set forth in the

indictment, so as to make the defendants liable as for a criminal offense; and in quashing the indictment upon that ground.

Tenth. The said District Court erred in holding that the facts stated in the indictment did not make a case of conspiracy to defraud the United States within the meaning of section 5440 of the Revised Statutes (as amended), regard being had to the provision of the said timber and stone act which limits the amount of land which an association of persons can purchase thereunder from the Government to 160 acres; and in thereupon quashing the indictment.

Eleventh. The said District Court erred in not holding that the indictment fully and sufficiently charged the defendants with the offense of conspiring to defraud the United States within the meaning of section 5440 of the Revised Statutes of the United States, and in not overruling the said motions to quash, accordingly.

Twelfth. The said District Court erred in holding that section 5440 of the Revised Statutes (as amended), in connection with the provisions of the said timber and stone act, does not make criminal a conspiracy to obtain from the United States, for a corporation, timber lands in excess of 160 acres by procuring a number of other persons to purchase from the United States separately, and with moneys furnished by the corporation, such quantities of timber lands
210 as they might, respectively, lawfully purchase, and thereupon, in pursuance of an antecedent agreement to that end, convey such lands over to the corporation; and in thereupon quashing the indictment.

Thirteenth. The said District Court erred in holding that section 5440 of the Revised Statutes (as amended), in connection with the provisions of the said timber and stone act, does not make criminal a conspiracy to obtain from the United States, for a corporation, timber lands in excess of 160 acres by procuring a number of other persons to purchase from the United States separately, and with moneys furnished by the corporation, such quantities of timber lands as they might, respectively, lawfully purchase, and thereupon, in pursuance of an antecedent agreement to that end, convey such lands to the corporation, even though such persons had already filed their preliminary applications to enter such lands before they were so induced by the defendants to complete their entries; and in thereupon quashing the indictment.

Fourteenth. The said District Court erred in not holding that the indictment sufficiently charged a conspiracy upon the part of the defendants to defraud the United States by obtaining, for a corporation named, in an indirect and fraudulent manner, a quantity of timber lands in excess of the quantity which they could have lawfully obtained directly for such corporation; and in thereupon quashing the indictment.

Fifteenth. The said District Court erred in holding that, because the charges of overt acts were predicated upon steps taken subsequently to the making of the preliminary applications, the indictment charged a conspiracy to obtain timber lands from the entrymen, after the entrymen had filed their preliminary applications, rather than

from the United States, through such entrymen, by procuring them to make and file such preliminary applications amongst other things; and in thereupon quashing the indictment.

211 Sixteenth. The said District Court erred in holding the indictment bad for duplicity in that it charged a conspiracy originating, and overt acts committed, more than three years before the presentation of the indictment, although it also charged that the conspiracy was engaged in continuously from the time when it began down to the time of the presentation of the indictment, and that overt acts were committed within the three years next before the finding of the indictment; and in thereupon quashing the indictment as bad for duplicity.

Seventeenth. The said District Court erred in holding that the allegations of the indictment to the effect that the defendants were to procure other persons to make entries of timber lands which were open to entry under the said timber and stone act, and secure patents therefor, did not cover the making by such persons of preliminary applications for such lands required by section 2 of the said act; and in thereupon quashing the indictment.

Eighteenth. The said District Court erred in not holding that the indictment sufficiently charged a conspiracy to defraud the United States by obtaining, for a corporation named, in an indirect and fraudulent manner, a quantity of timber lands in excess of the quantity which they could have lawfully obtained directly for such corporation; and this by procuring other persons for hire to do everything necessary to the securing of the title to such lands from the United States, including the executing and filing in the land office not only of the preliminary applications required of such entrymen, but also the taking of any and all steps necessary to the securing of such title in such entrymen as parts of the conspiracy; and in not denying the said motions to quash the indictment.

212 Nineteenth. The said District Court erred in not holding that the indictment could consistently and properly charge the offense of conspiracy as having been begun more than three years before the finding of the indictment, when it also charged that the conspiracy still existed and overt acts were committed thereunder within the three years next preceding the finding of the indictment; and in not accordingly overruling the opposite contention of the defendants made in and in connection with their said motions to quash the indictment.

Twentieth. The said District Court erred in not holding that the allegations of the indictment which charged that the conspiracy originated more than three years before the presentation of the indictment were mere matters of inducement to the real charge of conspiracy within three years, and that these and the overt acts charged to have been committed more than three years before the presentation of the indictment were not matters tending to vitiate the indictment; and in sustaining the special pleas of the defendants

and quashing the indictment, upon and because of that erroneous holding.

Twenty-first. The said District Court erred in holding that the overt acts charged in the indictment could be looked to as furnishing in part a description of the conspiracy itself; and in quashing the indictment upon an erroneous construction of the charging part thereof based upon such reference to the charges of overt acts.

Twenty-second. The said District Court erred in sustaining motions to quash the indictment, raising the point that the offense charged in the indictment was barred by the statute of limitations, in connection with averments that the defendants had not been fugitives from justice.

213 Wherefore, the United States of America prays that the judgment of the District Court of the United States for the District of Colorado be reversed, and that the said District Court be directed to reinstate the said indictment and proceed with the trial of the cause.

RALPH HARTZELL,
Assistant and Acting United States Attorney for the District of Colorado.
ERNEST KNAEBEL,
Special Assistant to the Attorney-General.

(Endorsed:) No. 2029. In the U. S. District Court. The United States of America, plaintiff, vs. Alexander T. Sullenberger, James S. Hatcher, Ellis M. Hampton, Eph. K. Caldwell, Robert E. Sloan, and Eudolphus M. Taylor, defendants. Assignment of errors. Filed Jan. 22, 1908. Charles W. Bishop, clerk. Earl M. Cranston, U. S. attorney for the District of Colo.

214 Fifty-fifth day, November term. Wednesday, January 22nd, A. D. 1908.

Present: The Honorable Robert E. Lewis, district judge, and other officers as noted on the fifth day of November, A. D. 1907.

THE UNITED STATES OF AMERICA
vs.
ALEXANDER T. SULLENBERGER ET AL. } 2029. Indictment for conspiracy.

Upon reading and filing the foregoing petition and the assignment of errors therein referred to,

It is ordered that the petition be, and the same hereby is, allowed, and that a writ of error as therein prayed be issued by the clerk of the Circuit Court for this district, under the seal of such Circuit Court, pursuant to section 1004 of the Revised Statutes.

215 In the District Court of the United States for the District of Colorado.

UNITED STATES OF AMERICA.
District of Colorado, ss:

UNITED STATES
versus
ALEXANDER T. SULLENBERGER ET AL. } No. 2029.

The clerk will issue a complete transcript of the record in the above-entitled cause, said transcript to contain indictment, all motions and all orders of court, together with the opinion of the court.

EARL M. CRANSTON, *Attorney for U. S.*

To Charles W. Bishop, clerk, Denver, Colorado, Jan. 4, 1908.

(Endorsed:) No. 2029. United States District Court for the District of Colorado. U. S. versus Alex. T. Sullenberger et al. Præcipe for transcript of record. Filed Jan. 4, 1908. Charles W. Bishop, clerk. Earl M. Cranston, attorney for U. S.

216 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judge of the District Court of the United States for the District of Colorado, greeting:

Because in the record, decision, and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, between The United States of America, plaintiff, and Alexander T. Sullenberger, James S. Hatcher, Ellis M. Hampton, Eph. K. Caldwell, Robert E. Sloan, and Eudolphus M. Taylor, defendants, a manifest error hath happened, to the great damage of the said United States of America, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 22nd day of January, in the year of our Lord one thousand nine hundred and eight.

[SEAL.] CHARLES W. BISHOP,
Clerk of the Circuit Court of the United States for the District of Colorado.

Allowed by
ROBT. E. LEWIS,
Judge of the District Court of the United States for the District of Colorado.

216½ *Return.*

THE UNITED STATES OF AMERICA,
District of Colorado, ss:

In obedience to the command of the within writ, I herewith transmit to the Honorable the Supreme Court of the United States, a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the seal of said United States District Court, for the District of Colorado, at Denver, in said district, this third day of February, A. D. 1908.

[SEAL.] CHARLES W. BISHOP, *Clerk.*

(Indorsed:) No. 2029. U. S. District Court, District of Colorado. The United States of America versus Alexander T. Sullenberger, James S. Hatcher, Ellis M. Hampton, Eph. K. Caldwell, Robert E. Sloan, and Eudolphus M. Taylor. Writ of error to U. S. District Court, District of Colorado. Filed in the District Court of the United States for the District of Colorado. Jan. 22, 1908, Charles W. Bishop, clerk.

217 UNITED STATES OF AMERICA, *ss:*

To Alexander T. Sullenberger, James S. Hatcher, Ellis M. Hampton, Eph. K. Caldwell, Robert E. Sloan, and Eudolphus M. Taylor, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the District Court of the United States for the District of Colorado, sitting at Denver, wherein The United States of America is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment and decision rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Robert E. Lewis, judge of the District Court of the United States for the District of Colorado, this 22nd day of January, in the year of our Lord one thousand nine hundred and eight.

ROBT. E. LEWIS,
Judge of the District Court of the United States for the District of Colorado.

217½ UNITED STATES OF AMERICA,
District of Colorado, ss:

I hereby certify that I received the within citation on January 27th, 1908, and served the same as to the defendants, Alexander T.

Sullenberger, James S. Hatcher, and Robert E. Sloan by delivering to and leaving with H. N. Hawkins, their attorney of record, and as to the defendants Ellis M. Hampton, Eph. K. Caldwell, and Eudolphus M. Taylor by delivering to Frank C. Goudy, their attorney of record, and to the above attorneys was left a true copy of the within writ on January 27th, 1908, at Denver, Colorado.

Fees and costs: 6 services, $12.00.

D. C. BAILEY, *U. S. Marshal.*
E. G. JEFFERDS, *Deputy.*

(Indorsed:) 2029. U. S. District Court, District of Colorado. The United States of America vs. Alexander T. Sullenberger et al. Citation. Filed Jan. 29, 1908, Charles W. Bishop, clerk.

218 UNITED STATES OF AMERICA,
District of Colorado, ss:

I, Charles W. Bishop, clerk of the District Court of the United States for the District of Colorado, do hereby certify the above and foregoing pages numbered from (1) to two hundred fifteen (215), both inclusive, to be a true, perfect, and complete transcript and copy of the pleadings and other matters set forth in the præcipe filed herein, together with a true copy of such præcipe, and bill of exceptions, petition for writ of error, and assignments of error, and judgment, and all other matters (exclusive of bench warrants, recognizances, and briefs) heretofore filed or entered of record in said court, and in a certain case lately in said court pending wherein The United States of America was plaintiff and Alexander T. Sullenberger, James S. Hatcher, Ellis M. Hampton, Eph K. Caldwell, Robert E. Sloan, and Eudolphus M. Taylor, were defendants, as fully and completely as the same still remain on file and of record in my office at Denver.

And I further certify that I have annexed to and transmit herewith a copy of all opinions heretofore handed down and filed in said case.

In testimony to the above I do hereunto sign my name and affix the seal of said court at the city and county of Denver in said district this third day of February, A. D. 1908.

[SEAL.] CHARLES W. BISHOP, *Clerk.*

* * * * * * *

232 UNITED STATES OF AMERICA,
District of Colorado, ss:

I, Charles W. Bishop, clerk of the District Court of the United States for the District of Colorado, do hereby certify the above and foregoing pages numbered from two hundred nineteen (219) to two hundred and thirty-two (232), to be a true, perfect, and complete transcript and copy of all opinions heretofore handed down and filed wherein The United States of America was plaintiff and Alexander

T. Sullenberger, James S. Hatcher, Ellis M. Hampton, Eph
233 K. Caldwell, Robert E. Sloan, and Eudolphus M. Taylor were defendants, as fully and completely as the same still remains on file in my office at Denver.

In testimony to the above I do hereunto sign my name and affix the seal of said court at the city and county of Denver in said district this third day of February, A. D. 1908.

[SEAL.] CHARLES W. BISHOP, *Clerk.*

235 In the Supreme Court of the United States, October term, 1907.

THE UNITED STATES, PLAINTIFF IN ERROR,
v. No. 629.
ALEXANDER T. SULLENBERGER ET AL.

Stipulation.

It is hereby stipulated by counsel for the parties to the above-entitled cause that in the printing of the transcript of the record herein the clerk of the Supreme Court shall omit pages 219 to 233, inclusive, being a repetition of the opinion of the court herein, which appears elsewhere in the transcript of the record, to wit: At pages 164 to 177, inclusive; also omit pages 178 to 202, inclusive, being the opinion of the court in the case of The United States v. Edgar M. Biggs et al., which is printed in the transcript of the record in that case.

H. M. HOYT, *Solicitor-General.*
FRANK C. GOUDY and
L. F. TWITCHELL,
E. F. RICHARDSON,
HORACE N. HAWKINS,
Counsel for Defendant in Error.

February, 1908.

236 (Indorsed:) File No. 21,032. Supreme Court U. S., October term, 1907. Term No. 629. The United States, P. E., vs. Alexr. T. Sullenberger et al. Stipulation to omit part of record in printing. Filed Feb. 29, 1908.

237 (Indorsed on cover:) File No. 21,032. Colorado D. C. U. S. Term No. 629. The United States, plaintiff in error, vs. Alexander T. Sullenberger, James S. Hatcher, Ellis M. Hampton et al. Filed February 19th, 1908. File No. 21,032.

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Office Supreme Court, U. S.
FILED
MAY 2 1908
JAMES H. McKENNEY,
Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1907.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
CHARLES H. FRIEDMAN ET AL. 288

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
EDGAR M. BIGGS ET AL. 289

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
ALEXANDER T. SHELLENBERGER ET AL. 290

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

MOTION TO ADVANCE.

In the Supreme Court of the United States.

OCTOBER TERM, 1907.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
CHARLES H. FREEMAN ET AL. } No. 627.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
EDGAR M. BIGGS ET AL. } No. 628.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
ALEXANDER T. SULLENBERGER ET AL. } No. 629.

MOTION TO ADVANCE.

Comes now the Solicitor-General on behalf of the United States and moves the court to advance the above-entitled causes on the docket for hearing during the present term.

These three cases are indictments under section 5440 of the Revised Statutes, charging conspiracy to obtain indirectly from the United States, for certain corporations, large amounts of timber lands "in excess of the quantity of such lands which the said corporation could lawfully obtain directly from the United States." They were heard and decided by the lower court at the same time as what are known

as the "coal-land cases," in which a motion to advance is submitted at the same time with this. The court sustained demurrers and motions to quash, the the principal opinion being rendered in case No. 628, *The United States* v. *Edgar M. Biggs et al.*, on the grounds that the indictment in each case did not charge an offense, and that the statute of limitations commenced to run from the time of the commission of the first overt act in pursuance of the conspiracy. Writs of error were sued out by the United States under the provisions of the act providing for writs of error in certain instances in criminal cases, approved March 2, 1907 (34 Stat., 1246), which provides that writs of error in such cases "shall be diligently prosecuted and shall have precedence over all other cases." In conformity with the apparent intent and policy of Congress as indicated in this act, and in accordance with rule 26, section 3, the Solicitor-General submits that an early hearing of these cases would accord with the public interests, especially as other cases, existing and prospective, can not be proceeded with until these are determined.

As the Government deems it of great importance to the administration of the criminal laws that these cases should be heard and determined, if possible, at this term, the Solicitor-General suggests that if the court shall grant this motion the cases be set for hearing on April 6 next.

So far as the Government is concerned the cases may be argued as and in the time of one case.

Due notice of this motion has been given, and acknowledgment of service filed with the clerk. Opposing counsel are understood to concur.

HENRY M. HOYT,
Solicitor-General.

FEBRUARY, 1908.

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Office Supreme Court, U. S.
FILED.
MAR 6 1908
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 627. 288

THE UNITED STATES, PLAINTIFF IN ERROR,

v.

CHARLES H. FREEMAN ET AL.

No. 628. 289

THE UNITED STATES, PLAINTIFF IN ERROR,

v.

EDGAR M. BIGGS ET AL.

No. 629. 290

THE UNITED STATES, PLAINTIFF IN ERROR,

v.

ALEXANDER T. SULLENBERGER ET AL.

Response of Defendants in Error in United States v. Charles H. Freeman et al., No. 627, and United States v. Edgar M. Biggs et al., No. 628, to the Motion to Advance.

CHARLES J. HUGHES, JR., AND
CLYDE C. DAWSON,
Attorneys for Defendants in Error, Charles H. Freeman et al. and Edgar M. Biggs et al.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 627.

THE UNITED STATES, PLAINTIFF IN ERROR,

v.

CHARLES H. FREEMAN ET AL.

No. 628.

THE UNITED STATES, PLAINTIFF IN ERROR,

v.

EDGAR M. BIGGS ET AL.

No. 629.

THE UNITED STATES, PLAINTIFF IN ERROR,

v.

ALEXANDER T. SULLENBERGER ET AL.

Response of Defendants in Error in United States v. Charles H. Freeman et al., No. 627, and United States v. Edgar M. Biggs et al., No. 628, to the Motion to Advance.

The Solicitor-General is in error, as the record will disclose, in the statement that the three cases named above

were heard and decided by the District Court at the same time as what are known as the Coal Land Cases, nor in the three cases above enumerated were the arguments had together, but Nos. 627 and 628 were heard in the same argument, No. 629 was heard separately, the Coal Land Cases were heard at other times and were decided in a different opinion and at a different time from the three cases above named.

We do not deem it necessary now to controvert or discuss the statement, made in the motion, as to the effect of the decisions in these two cases, the principal opinion in which was rendered in No. 628, but do not agree to the statement upon that subject made in the motion to advance. We are not advised of the other cases, existing and prospective, which cannot be proceeded with until these are determined, but the defendants in error are not opposed to an early disposition of the writs of error sued out by the United States in Nos. 627 and 628, but would respectfully suggest that their determination is of great importance to the defendants in error, and that they should be given opportunity to fully present their contentions in opposition to the views urged on behalf of the United States; and that this cannot be done by uniting the cases with No. 629 and hearing them within the time usually, under the rules of this honorable court, accorded to each case, whatever its nature. We therefore object to the consolidation of Nos. 627 and 628 with No. 629 and the same being heard under any arrangement that will restrict the time which would otherwise be awarded under the rules of this court to the defendants in error in the first-named cases.

There is no objection to Nos. 627 and 628 being heard together, but as there are some differences between them which, under one phase of the case, are required to be separately presented, we respectfully suggest that some additional time to that allotted by rule to one case should be granted to the defendants in error if these two cases are heard together.

It is observed that the Solicitor-General suggests that if the court should grant the motion to advance, that April 6th next will be acceptable to the United States. This date would work a hardship upon counsel for the defendants in error, owing to important engagements already made and which cover that time, and it is respectfully suggested that a later date in the term, if the matters are advanced to be heard during this term, should be fixed, as this can be done without inconveniencing either the counsel for the Government or for the defendants in error.

It is mentioned in the motion to advance that it is understood that opposing counsel concur, by which it might be understood that they were understood to concur in the first two named cases above being heard with the last named, and upon the 6th of April next, and argued in the time of one case. This is a misapprehension of the position of counsel for defendants in error in Nos. 627 and 628.

It is the desire of the defendants in error that an early disposition shall be had of the cases, but it is not desired that, in securing this end, there should be any abridgment of the opportunities to present the cases in oral argument or by naming a date which will be an inconvenience and hardship upon the defendants in error and their counsel.

Counsel for defendants in error in Nos. 627 and 628 are advised by counsel for defendants in error in No. 629 that their position concerning the consolidation of Nos. 629, 628, and 627 and the limitation in argument to the time of one case is in conformity with the views herein presented, and that if they should not file a separate memorandum herein they desire their position to be called to the attention of the court by counsel for defendants in error in Nos. 627 and 628, and this is therefore respectfully done.

CHARLES J. HUGHES, JR., AND
CLYDE C. DAWSON,
Attorneys for Defendants in Error, Charles H. Freeman et al. and Edgar M. Biggs et al.

JUDD & DETWEILER, INC.,
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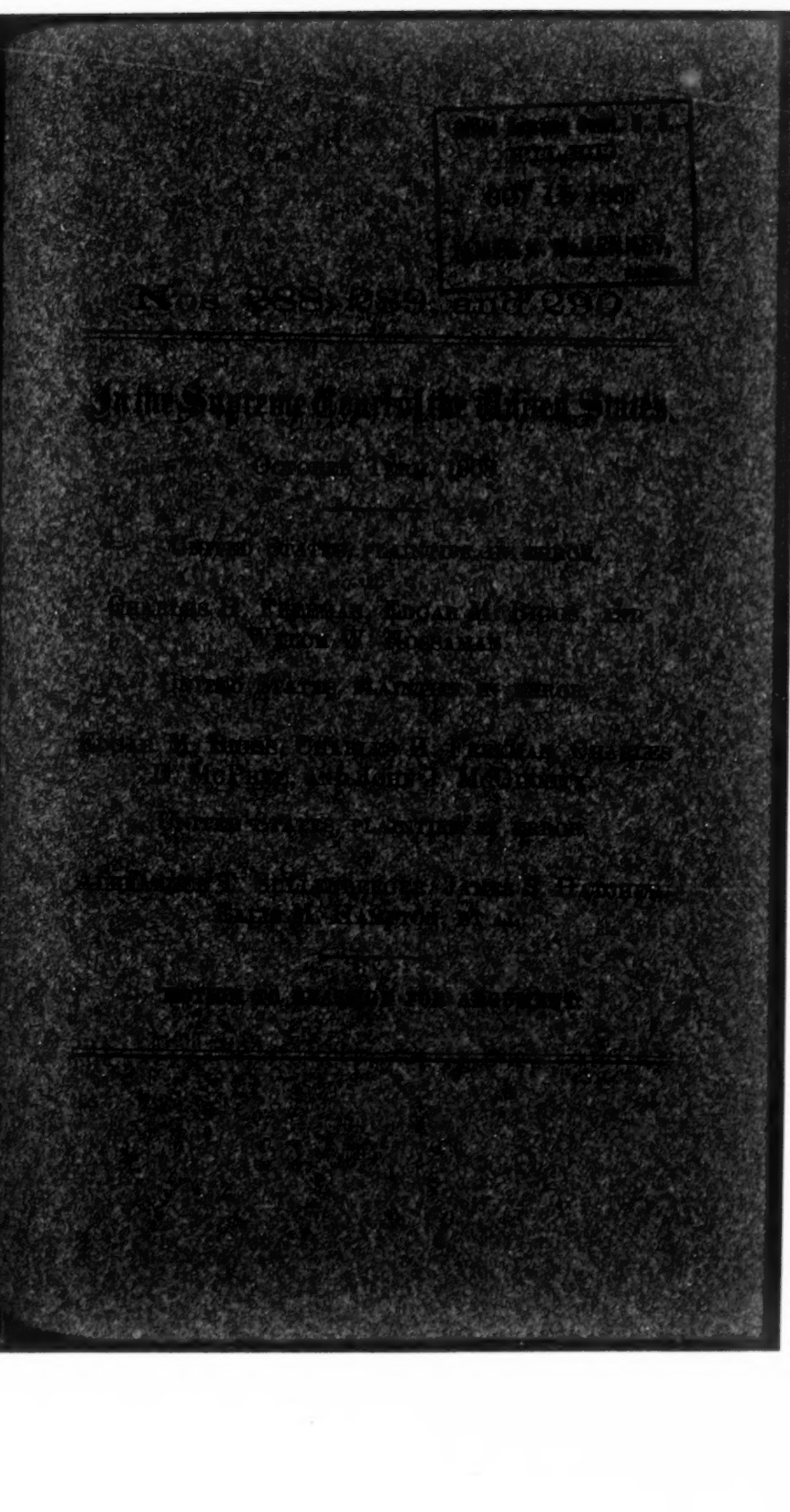

In the Supreme Court of the United States.

OCTOBER TERM, 1908.

UNITED STATES, PLAINTIFF IN ERROR, v. CHARLES H. FREEMAN, EDGAR M. Biggs, and Welch W. Nossaman.	No. 288.
UNITED STATES, PLAINTIFF IN ERROR, v. EDGAR M. BIGGS, CHALES H. FREEMAN, Charles D. McPhee and John J. McGinnity.	No. 289.
UNITED STATES, PLAINTIFF IN ERROR, v. ALEXANDER T. SULLENBERGER, JAMES S. Hatcher, Ellis M. Hampton, et al.	No. 290.

MOTION TO REASSIGN FOR ARGUMENT.

The Attorney-General, on behalf of the United States, moves that the above-entitled cases be reassigned for argument on December 14, 1908, to be heard as one case. They are now assigned for October 13, 1908, to be heard as one case.

Defendants were indicted under section 5440, Revised Statutes of the United States, for conspiracy to defraud the United States in fraudulently obtaining public lands which were for sale under

the timber and stone act. Demurrers interposed by defendants were sustained by the District Court in opinions rendered December 24, 1907. Writs of error to the District Court were obtained under the criminal appeals act and the cases docketed in this court February 20, 1908. In March, 1908, upon motion of the United States the cases were advanced for hearing on October 13, 1908.

Since the adjournment of the Court the staff of this Department has been reduced by the resignations of Hon. Milton D. Purdy, Assistant to the Attorney-General, and of Assistant Attorneys-General Cooley and Sanford. Only the last-mentioned vacancy has been filled, and the legal force of the Department has been therefore greatly pressed for time in the preparation of the numerous and important cases assigned for hearing on the first day of the present term. The law officers of the Government have been consequently obliged to consider which of the cases in question might be assigned to a somewhat later day without injury to the public interest, and, after such consideration, they submit the request herein contained with regard to the cases first above mentioned. The Attorney-General feels assured that, at the date suggested, the Government will be fully prepared to dispose of the said cases.

CHARLES J. BONAPARTE,
Attorney-General.

OCTOBER, 1908.

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Office Supreme Court, U. S.
FILED.
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JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

Nos. 288, 289, and 290.

UNITED STATES, PLAINTIFF IN ERROR,

vs.

EDGAR M. BIGGS ET AL.

UNITED STATES, PLAINTIFF IN ERROR,

vs.

CHAS. H. FREEMAN ET AL.

UNITED STATES, PLAINTIFF IN ERROR,

vs.

ALEXANDER T. SULLENBERGER ET AL.

OBJECTIONS OF DEFENDANTS IN ERROR TO POSTPONEMENT OF ORAL ARGUMENT.

C. J. HUGHES, JR.,
CLYDE C. DAWSON,
Attorneys for Defendants in Error in Cases Numbered 288 and 289.
HORACE N. HAWKINS,
EDMUND F. RICHARDSON,
Attorneys for Defendants in Error in Case Numbered 290.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

Nos. 288, 289, and 290.

UNITED STATES, PLAINTIFF IN ERROR,

vs.

EDGAR M. BIGGS ET AL.

UNITED STATES, PLAINTIFF IN ERROR,

vs.

CHAS. H. FREEMAN ET AL.

UNITED STATES, PLAINTIFF IN ERROR,

vs.

ALEXANDER T. SULLENBERGER ET AL.

OBJECTIONS OF DEFENDANTS IN ERROR TO POSTPONEMENT OF ORAL ARGUMENT.

Counsel representing the defendants in the above-entitled cases dislike very much to appear ungracious in not consenting to the request of the Attorney General that the hearing in said cases, set for October 13, be postponed by reassignment to the 14th of December. We feel, however, that

in justice to our clients these cases should be heard at the earliest possible moment, for the following reasons:

1. The indictments against all of the defendants were found in June, 1907. The hearing upon the demurrers and motions to quash was had in December of the same year, and the court sustained said demurrers and motions and quashed said indictments on the 24th day of that month. The writs of error in all of the cases were taken and lodged in this court in February, 1908; so that at least eight months have expired since the cases came to this court, and said cases have been set down for hearing for at least a number of months past.

2. These writs were sued out under the provisions of the act of March 2, 1907, which, among other things, provides:

> "The writ of error in all cases shall be taken within thirty days after the decision or judgment has been rendered and shall be diligently prosecuted and shall have precedence over all other cases."
> 34 Stats. L., 1246.

3. Prior to the passage of this statute, the Government had no authority under which it could bring cases of this character, under the circumstances here involved, to this court: the decision of the lower court would have been final and the defendants would have been discharged; while, as the matter now stands, the defendants are not discharged, but are held on their personal recognizance, to await the determination of the matter in this court, and if a reversal is had, to await a final determination of the matter in the lower court.

4. The defendants in these cases had for twenty-five years prior to the finding of these indictments been looked upon as upright, substantial, and leading citizens of the State of Colorado, and feel that they should have the right of a speedy hearing, guaranteed to the humblest citizen by the

Constitution, and amplified and emphasized by the provisions of the statute under which these writs are taken.

5. The defendants have, from the time when these indictments were returned, been urgent in insisting that there be no delay and that a final disposition of the indictments be had at the earliest possible moment. In fact, demurrers and motions were only filed at the suggestion of counsel, who believed that every legal right of the defendants should be insisted upon, it being the desire of the defendants personally that no objections to the indictments be made which would delay the actual and final trial.

6. Those defendants, who are officers and stockholders of the New Mexico Lumber Company and the Pagosa Lumber Company, for which companies, it is said in the indictments, that the acts complained of in the indictments were performed, find their companies in this position, which adds a special reason as to why there should be a speedy hearing in these matters: Each of said companies is engaged in the timber and saw-mill business, and has, at great expense, constructed saw-mills, railroads, and all of the things necessary for the proper conduct of the saw-mill business in the localities where the companies are situated. Since the building of the mills of the two companies a large part of the adjacent territory has been placed in what is known as the San Juan National Forest Reserve. The mills of these companies are so situated that they can more economically cut such timber as is mature, upon parts of this reserve than any one else, and to that end each of said companies has, within the current year, made application to the Forest Service to purchase timber upon lands adjacent to the mills. In the case of the New Mexico Lumber Company, it has largely cut over such lands as belonged to it in the vicinity of its mill and which are reached by its railroad, and it becomes important both to the company and to the Government, if the timber upon the lands adjacent to this railroad

is ever to be cut, that it be cut before said railroad is removed or abandoned.

With this in view, the company made application to the Forest Service to purchase a large amount of timber in the locality above mentioned, but the Forest Department, reversing the time-honored rule—that one is presumed to be innocent until proven guilty—and losing sight of the fact that as early as December, 1907, the United States District Court had held that the indictments here under consideration charge no offense against the defendants, refused to consider the application of the company to purchase, on the ground that officers of the company were laboring under the disability of the indictments here for consideration, saying in a letter dated April 15, 1908, and signed by the Associate Forester:

> "Your letter of April 10 is received in Mr. Pinchot's absence from the office. The application of the New Mexico Lumber Company was not given favorable consideration for the reason that on June 20, 1907, J. J. McGinnity and E. M. Biggs, who are both officers of this company, were indicted by the Federal grand jury at Denver, Colorado, for conspiracy to defraud the United States in violation of section 5440 of the Revised Statutes. Since it is the policy of the Forest Service not to grant permits or make sales to persons under such indictment, no action can be taken upon the company's application until the case has been disposed of satisfactorily to the Department of Justice. A letter is being written to that Department to ascertain the present status of the case and if possible the company's application will be given prompt attention."

We have a further letter to the same general effect, from the same officer, bearing date of May 7, 1908, and another of like general tenor bearing date of May 18, 1908, coming from the Forest Supervisor, which contains the further statement:

"Personally I am very sorry because I have favored the sale of this timber before your railroad should be removed from the territory."

So far as the Pagosa Lumber Company, whose president is under indictment in one of the cases now under consideration, is concerned, that company also has its logging railroads adjacent to said San Juan National Forest Reserve, and it, too, has applied to the Government to purchase timber which the Government admits is mature and should be cut and which is for sale by the Government. The Forestry Department has refused to make any sale or to approve any application made by this company. In a letter dated June 22, 1908, from the Forest Supervisor, Mr. Sullenberger, one of the defendants now before this court, is informed that no application made by his company will be approved. The Forest Supervisor adds to his letter this statement:

"Personally I am very sorry, for there is considerable mature timber on that district."

It thus clearly appears that because the officers of these two companies, the New Mexico Lumber Company and the Pagosa Lumber Company, are under indictment, that neither of these two companies is to be permitted to purchase timber which the Government has for sale. We submit that when the Government takes this position, that it should not ask for any postponement of the consideration of these indictments, especially when we consider that there may be many other stockholders of said companies whose property rights and interests will suffer by reason of this refusal, though they may never have done and may never have been charged with doing anything in violation of any of the laws of the United States or any other sovereignty.

7. There is another reason why these causes should not be postponed: There are now seven or eight cases here from

Colorado in which indictments have been quashed, including the three cases now sought to be postponed. These seven or eight cases, while having many questions not in common, are all akin to each other; most, if not all, are based on section 5440 of the Revised Statutes; they all involve, as we understand, the question of the jurisdiction of this court under the 1907 writ-of-error statute; all of these cases—those sought to be postponed and those now desired by the Government to be heard—shade into each other; the principles involved are interlocked and interwoven; the decision in one case may be controlling as to some features of the others. To hear only a part of them now and to postpone others would be in effect to deprive a part of the counsel now present of the right to be heard as to questions in which their clients are vitally interested.

We submit that justice to this court demands that the cases here from Colorado, of this character, all be considered before an opinion is attempted to be written as to part of them. An examination of the different records will show that, taking all of the cases together, practically every question that can arise as to jurisdiction under the new 1907 statute is now before the court. Some of the phases of this question are in the cases now sought to be postponed by the Attorney General, and not in the others. If this court can have before it at the same time all of these questions arising under the 1907 statute, we submit that it would be able to deal with the question of jurisdiction from a broader viewpoint than to undertake to take up the questions by piecemeal.

The defendants in error in these causes have no objection to the Attorney General taking such reasonable time for the filing of briefs as may be thought proper, even after the cases are submitted on oral argument, provided that the defendants in error shall have a reasonable time, after receiving the Government's brief, to file their reply thereto.

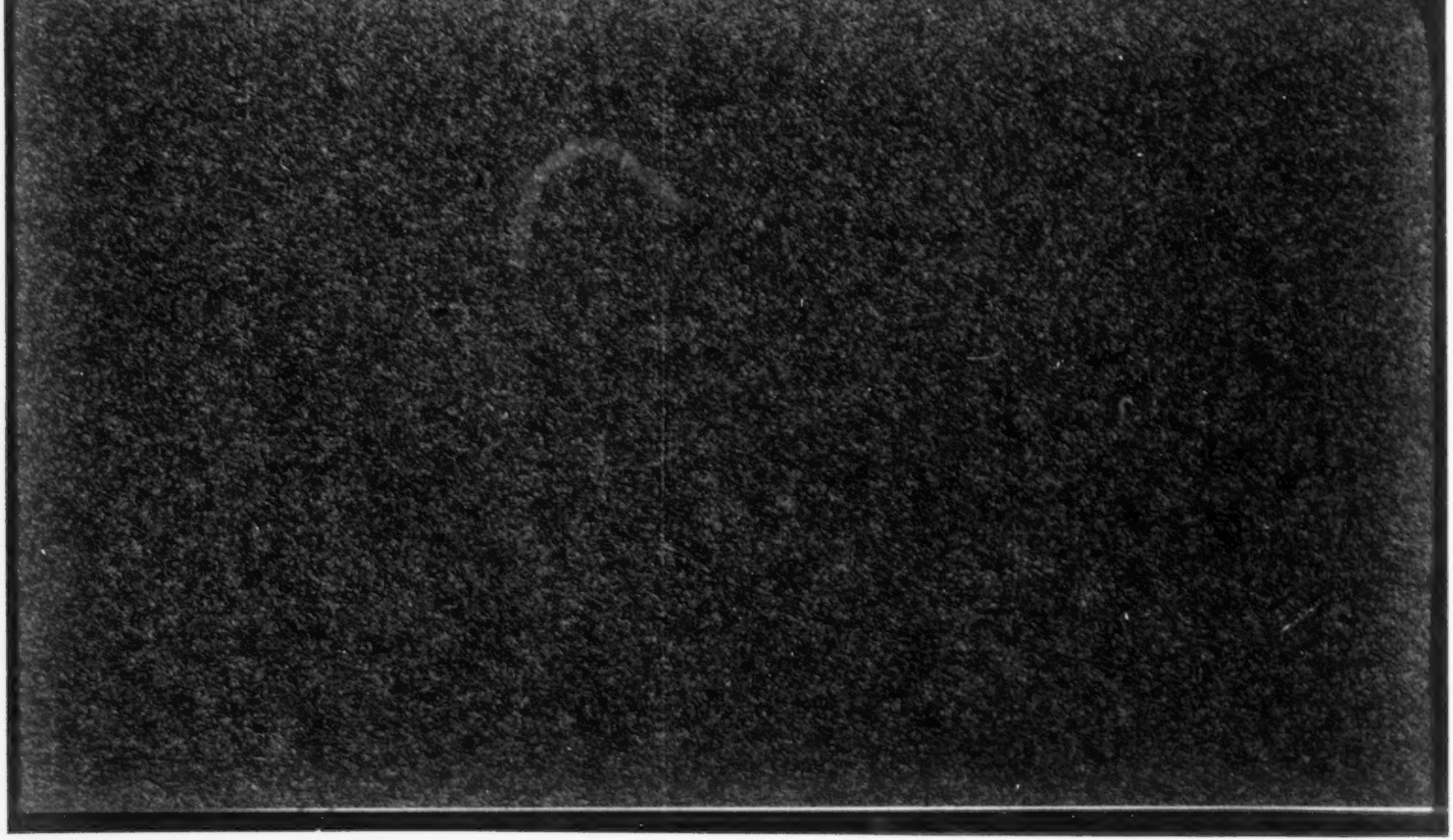
While it is apparent, from what we have said, that we are very anxious that the oral argument in these cases should

not go over, yet if the court, in its discretion, sees fit to make a reassignment of these cases, the date of December 14, suggested by the Attorney General, would suit counsel for the defendants in error better than any later date.

Respectfully submitted,

C. J. HUGHES, JR.,
CLYDE C. DAWSON,
Attorneys for Defendants in Error in Cases Numbered 288 *and* 289.

EDMUND F. RICHARDSON AND
HORACE N. HAWKINS,
Attorneys for Defendants in Error in Case Numbered 290.



In the Supreme Court of the United States.

OCTOBER TERM, 1908.

THE UNITED STATES, PLAINTIFF IN ERROR, *v.* CHARLES H. FREEMAN, EDGAR M. BIGGS, and Welch M. Nossaman.	No. 288.
THE UNITED STATES, PLAINTIFF IN ERROR, *v.* EDGAR M. BIGGS, CHARLES H. FREEMAN, Charles D. McPhee, and John J. McGinnity.	No. 289.
THE UNITED STATES, PLAINTIFF IN ERROR, *v.* ALEXANDER T. SULLENBERGER, JAMES S. Hatcher, Ellis M. Hampton, et al.	No. 290.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

BRIEF FOR THE UNITED STATES.

STATEMENT.

Defendants in each case are charged under section 5440, U. S. Rev. Stats., with conspiring to

defraud the United States by indirectly obtaining from the United States, for a corporation, lands open to entry under the timber and stone act, in excess of the quantity the corporation could lawfully acquire directly, by hiring persons to make entries as individual entrymen and deed the land to the corporation or its agent. Defendants raise the question whether, in charging that they conspired to procure others to "make entries," it was intended to include as part of the "entries" the initial step of an entry, namely, making an application. If this question is decided affirmatively the indictments are unquestionably good unless they are duplicitous or the crimes charged are barred by the statute of limitations. If it should be determined that the word " entries " does not include making applications, it leaves for consideration the question whether it is unlawful to hire persons who have made applications to complete the entries as individual entrymen and deed the lands to a corporation, which could not in its own name obtain such lands from the United States, the corporation furnishing the funds necessary to make the entries and being the real purchaser of the lands from the United States.

Upon demurrers and motions to quash the District Court decided these questions against the Government, which has sued out writs of error under the criminal appeals act.

In No. 289 the indictment, returned June 22, 1907, charges that on August 25, 1899, and

at the several times of committing the several overt acts thereafter enumerated, and *continuously at all times between said 25th day of August and the date of presenting the indictment,* at Durango, in the district of Colorado, defendants conspired to obtain *indirectly from the United States* for the New Mexico Lumber Company, a corporation, a large quantity of timber lands (described therein) *in excess of the quantity the corporation could lawfully obtain directly from the United States;* that the lands so to be obtained were situated within the Durango land district of the United States, in said district of Colorado, " were surveyed *vacant public* lands *of the United States* * * * which *had not been offered at public sale* according to law," were unfit for cultivation, chiefly valuable for timber, and "*open to entry* at the land office of the United States " at said Durango.

It is charged these timber lands were to be obtained from the United States for said corporation by the defendants' soliciting and procuring certain named persons " for hire and under agreements with them separately to that end, to pay to the receiver of the said land office, with moneys to be furnished to them by the said corporation, the price fixed by law therefor, *make entries as individual entrymen, at the land office* aforesaid, with the said register, of tracts of such lands in quantities respectively not exceeding the quantities allowed by the said laws and regulations, secure patents from the said United States to the said land *for them-*

selves as such entrymen, and make conveyances of the title of the said lands to one William Barth, an agent of and trustee for the said corporation, and by the said defendants, requiring the said William Barth to convey such title to the said corporation."

As an overt act it is then alleged that in pursuance, and to effect the object, of this conspiracy, defendant Freeman afterwards, to wit, on August 25, 1899, at said Durango, unlawfully by solicitation and promise of reward in a sum of money, the amount of which is unknown to the grand jurors, induced and procured Jennie Culbertson to execute and verify by oath before the register of the land office a certain document, in the form prescribed by law and entitled "Testimony of claimants," for presentation by her to the said register and through said register to the Commissioner of the Land Office and the Secretary of the Interior in connection with the entry by her of certain described timber lands. Six other overt acts are then set out in like form, with different dates and names of entrymen.

In charging the eighth and last overt act it is alleged that in pursuance, and to effect the object, of the conspiracy defendants McPhee and McGinnity, on May 15, 1906, at Denver, in said district, unlawfully requested and required William Barth to execute a deed conveying title to all the lands described in the preceding overt acts from said William Barth to the New Mexico Lumber Company, said deed being set out in full. The

indictment then closes by charging that defendants on August 25, 1899—

> and from thence hitherto, and at the several times of the committing of the said several overt acts in this indictment charged (the said unlawful, corrupt, wicked, and malicious conspiracy, combination, confederation, and agreement, *during all the time from the said day when the same was originally entered into, to wit, the said 25th day of August, in the year 1899, to the date of the presenting of this indictment, being still continuing and in existence*), in manner and form in this indictment aforesaid, unlawfully, corruptly, wickedly, and maliciously did conspire, combine, confederate, and agree together, and with others, indirectly, deceitfully, and fraudulently, to obtain from the said United States, for the said corporation, certain of the public lands and property of the said United States in quantity greatly in excess of the quantity which the said corporation could lawfully obtain directly from the said United States under a proper and lawful administration of the said laws and regulations, and thereby, and in that manner, defraud the said United States of its valuable property in such lands, and also of its governmental function in the matter of preserving and disposing of the same lands, as well as out of its right to administer an intelligent and honest service in that behalf in the interests of the people of the said United States.

The indictment in No. 288, returned June 22, 1907, is the same as the indictment in No. 289 except that Nossaman is a defendant in the place of McPhee and McGinnity, different lands are described as having been sought to be obtained, different dates are given, and more overt acts are set out. The conspiracy is alleged to have been formed March 30, 1901, and contemplated that entrymen would deed lands directly to the corporation instead of to an agent of the corporation such as Barth. Overt acts 1 to 11, inclusive, follow the form of the first overt act in No. 289, and are alleged to have been committed on various dates from March 30, 1901, to August 12, 1901. Overt acts Nos. 12 to 22, inclusive, charge that defendants on May 5, 1905, caused and procured the issuance by the United States of patents for lands described in the first 11 overt acts. Two overt acts (Nos. 23 and 24) are then set out, charging that defendant Nossaman on February 19, 1907, at Pagosa Springs in the District of Colorado unlawfully required and procured the persons named as entrymen in overt acts Nos. 4 and 5 to sign and execute deeds conveying title to lands described in the last aforesaid overt acts to the New Mexico Lumber Company, the deeds being set out at length.

The indictment in No. 290, also returned June 22, 1907, is substantially the same as the indictment last described. Other persons are named as defendants, other lands are described, and the conspiracy is alleged to have been formed June 6, 1901. The Pa-

gosa Lumber Company is the corporation to which defendants conspired to have conveyed the timber lands to be acquired from the United States. Overt acts Nos. 1 to 19, inclusive, which are the same in form as the first overt act in No. 289, are alleged to have been committed between June 6, 1901, and October 26, 1906. In the next 19 overt acts (Nos. 20 to 38, inclusive) it is alleged that defendants on certain dates, from June 6, 1901, to October 26, 1906, at Pagosa Springs, in said district, in behalf of said corporation, furnished the entrymen named in the first 19 overt acts a certain sum of money for use by them in making payment to the said receiver of the said land office of the price fixed by law for the timber lands then being entered by the said entrymen. Overt acts Nos. 39 to 57, inclusive, charge that on certain dates, from June 1, 1901, to November 13, 1906, at said Pagosa Springs, defendants unlawfully required and procured the entrymen named in the first 19 overt acts to sign and execute deeds conveying title to the lands described in said overt acts from them to the Pagosa Lumber Company. Overt acts 58 to 68, inclusive, charge that defendants on certain dates, from May 15, 1905, to December 17, 1906, unlawfully caused and procured the issuance by the United States of patents for lands described in overt acts Nos. 1 to 10, inclusive, and No. 13.

All of the defendants in No. 289 filed demurrers, claiming, inter alia, that the indictment did not charge any crime against the United States and

that it was duplicitous, and setting up the statute of limitations. These demurrers were sustained, the court holding—

(1) That the indictment properly construed charged that defendants conspired to procure, for hire, persons who had already filed applications for entry under that act to complete their entries and then to convey to the New Mexico Lumber Company, which company would furnish money necessary to make the entries; and that this scheme is lawful under the timber and stone act, and is not a conspiracy to defraud the United States within the meaning of section 5440.

(2) That the indictment is duplicitous in that a crime is alleged to have been committed on each of the dates set out in the overt acts.

(3) That the statute of limitations began to run when the first overt act was committed, which was more than three years prior to the return of the indictment.

(4) That procuring the execution of the Barth deed, which is the only act alleged to have been committed within three years of the return of the indictment "could not by any possibility have been done to effect the object of the conspiracy" and does not toll the limitation of the statute.

In Nos. 288 and 290, upon motions to quash and demurrers, and in No. 288 upon a plea of the statute of limitations by Nossaman, the court said that the same principles applied in No. 289 were applicable in these, except as to what was there said about the Barth deed.

TIMBER AND STONE ACT.

(Approved June 3, 1878, 20 Stat., 89.)

CHAP. 151.—An act for the sale of timber lands in the States of California, Oregon, Nevada, and in Washington Territory.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That surveyed public lands of the United States within the States of California, Oregon, and Nevada and in Washington Territory, not included within military, Indian, or other reservations of the United States, valuable chiefly for timber, but unfit for cultivation, and which have not been offered at public sale according to law, *may be sold* to citizens of the United States, or persons who have declared their intention to become such, *in quantities not exceeding one hundred and sixty acres to any one person or association of persons,* at the minimum price of two dollars and fifty cents per acre; and lands valuable chiefly for stone may be sold on the same terms as timber lands: *Provided,* That nothing herein contained shall defeat or impair any *bona fide* claim under any law of the United States, or authorize the sale of any mining claim, or the improvements of any *bona fide* settler, or lands containing gold, silver, cinnabar, copper, or coal, or lands selected by the said States under any law of the United States donating lands for internal improvements, education, or other purposes: *And provided further,* That none of the rights conferred by the act approved July twenty-sixth, eighteen hundred and sixty-six, entitled "An act granting the right of

way to ditch and canal owners over the public lands, and for other purposes," shall be abrogated by this act; and all patents granted shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under and by the provisions of said act; and such rights shall be expressly reserved in any patent issued under this act.

SEC. 2. That any person desiring to avail himself of the provisions of this act shall file with the register of the proper district a written statement in duplicate, one of which is to be transmitted to the General Land Office, designating by legal subdivisions the particular tract of land he desires to purchase, setting forth that the same is unfit for cultivation, and valuable chiefly for its timber or stone; that it is uninhabited; contains no mining or other improvements, except for ditch or canal purposes, where any such do exist, save such as were made by or belong to the applicant, nor, as deponent verily believes, any valuable deposit of gold, silver, cinnabar, copper, or coal; that deponent has made no other application under this act; that he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit; and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the Government of the United

States should inure, in whole or in part, to the benefit of any person except himself; which statement must be verified by the oath of the applicant before the register or the receiver of the land office within the district where the land is situated; and if any person taking such oath shall swear falsely in the premises, he shall be subject to all the pains and penalties of perjury, and shall forfeit the money which he may have paid for said lands, and all right and title to the same; and any grant or conveyance which he may have made, except in the hands of *bona fide* purchasers, shall be null and void.

SEC. 3. That upon the filing of said statement, as provided in the second section of this act, the register of the land office shall post a notice of such application, embracing a description of the land by legal subdivisions, in his office, for a period of sixty days, and shall furnish the applicant a copy of the same for publication, at the expense of such applicant, in a newspaper published nearest the location of the premises, for a like period of time; and after the expiration of said sixty days, if no adverse claim shall have been filed, the person *desiring to purchase* shall furnish to the register of the land office satisfactory evidence, first, that said notice of the application prepared by the register as aforesaid was duly published in a newspaper as herein required; secondly, that the land is of the character contemplated in this act, unoccupied and without improvements, other than those excepted, either mining or

agricultural, and that it apparently contains no valuable deposits of gold, silver, cinnabar, copper, or coal; and upon payment to the proper officer of the *purchase money* of said land, together with the fees of the register and the receiver, as provided for in case of mining claims in the twelfth section of the act approved May tenth, eighteen hundred and seventy-two, the applicant may be permitted *to enter* said tract, and, on the transmission to the General Land Office of the papers and testimony in the case, a patent shall issue thereon: *Provided*, That any person having a valid claim to any portion of the land may object, in writing, to the issuance of a patent to lands so held by him, stating the nature of his claim thereto; and evidence shall be taken and the merits of said objection shall be determined by the officers of the land office, subject to appeal, as in other land cases. Effect shall be given to the foregoing provisions of this act by regulations to be prescribed by the Commissioner of the General Land Office.

This act was made applicable to all public-land States by act of August 4, 1892 (27 Stat., 348).

ARGUMENT.

I.

This court has jurisdiction to review these cases.

The criminal appeals act authorizes the United States to sue out a writ of error from this court in a criminal case where the decision or judgment of the District Court is "based upon the * * * con-

struction of the statute upon which the indictment is founded." Defendants are charged, under section 5440, with a conspiracy to defraud by obtaining lands in violation of the timber and stone act. The decisions and judgments appealed from clearly show: (1) that the court construed section 5440, holding that the word "defraud" is used in that section in its common-law sense and, therefore, that the acts charged must involve base moral turpitude; (2) that the court construed the timber and stone act, holding that the conspiracies charged did not contemplate a violation of that act; (3) that the court again construed section 5440, holding that the offense of conspiracy to defraud made punishable thereunder is completed when the first act is done to effect the object of the conspiracy, so as to start the statute of limitations running from that time.

In reading the opinion of the court in this case it must be borne in mind that it was rendered contemporaneously with the opinion of the same court in the cases of the *United States* v. *Keitel, Forrester, Herr, et al.* (coal land cases), recently argued in this court. In those cases the court rested its decision as to the insufficiency of the first count in the Keitel case and the indictments in two of the other cases clearly and distinctly upon its conclusion that the word " defraud " was used in section 5440 in its common-law sense, and in conspiracies to defraud at common law " the ends intended by the conspirators must necessarily involve moral turpitude of the basest sort, in the

results, if successful, such as threaten the health of a large body of people by the sale of impure food or, in some instances, even life." While it is not so clear in these cases that the court held the indictments bad in part by applying this construction of section 5440, the opinion indicates that such is the fact. The court commences its opinion, after stating the facts, by saying that the question is, "Do the facts charged constitute a defrauding of the United States within the meaning of the second clause of section 5440?" The court then says that that section does not define the offense, but that "it is more in the nature of a taking over and an application to federal criminal jurisprudence of the well-defined common-law offense." A definition of conspiracy as given by this court is then referred to, and it is stated that this definition must be borne in mind. The court says in reference to the acts with which defendants are charged:

> Such acts do not involve moral turpitude, such base, corrupt, and malevolent purpose as will constitute a criminal defrauding; such baseness, vileness, and depravity as exists in *Curley* v. *United States* (130 Fed., 1) and *United States* v. *Stone* (135 Fed., 393).

One of the court's conclusions is thus stated:

> The acts charged are neither prohibited by statute and unlawful, nor mala in se, nor do they involve moral turpitude; hence whether we consider them either as means to accomplish an end or as the end to be accomplished, they do not constitute a crime.

Reading this opinion in connection with the opinion of the District Court in the coal land cases, it seems to us that the court intended to hold that the conspiracies charged (construing the indictments as referring only to acts of entrymen subsequent to applications) do not constitute conspiracies to defraud, as section 5440 is construed by the court, regardless of what construction is given to the timber and stone act. If this is so, there can be no question that the decision of the District Court was based upon the construction of the statute upon which the indictment is founded. This point is so obvious and was so recently discussed in the coal land cases that we deem it unnecessary to argue it further.

It can not be doubted that the District Court construed the timber and stone act. After holding that the word " entries " did not include the making of applications, the court proceeded to discuss and pass upon the meaning of that act in order to determine whether the conspiracies contemplated something made unlawful by it. The indictments are founded upon the timber and stone act as well as section 5440. They charge that defendants conspired to defraud the United States by obtaining lands open to entry under the laws pertaining to the entry and sale of timber lands, and that the conspiracies contemplated a violation of that act in their object, which was to obtain lands in excess of the quantity that might be sold to an association, as well as in the means by which that object was to be effected. It is only because of the provisions of

that law that the charges made against defendants could possibly constitute a conspiracy to defraud. Clearly, the indictments are founded upon the timber and stone act fully as much as they are upon section 5440.

Defendants contended that a conspiracy to defraud, punishable under section 5440, is complete when the first act is done to effect its object; that the conspiracy referred to in section 5440 is not a continuing offense; and that, regardless of how many acts have been committed in pursuance of the conspiracy within three years of the finding of the indictment, if the first overt act was done prior to that three-year period, the statute of limitations would bar a prosecution. In passing upon these points it became necessary for the court to construe section 5440 and define the conspiracy made a crime by that section. So, we find that the court was again called upon and did construe the statute upon which the indictments were founded.

II.

The words "make entries" include the making of applications.

In order to enter lands under the timber and stone act the law requires the following steps to be taken: (1) file a sworn application, as provided for in the second section; (2) post and publish notice of the application for 60 days; (3) furnish proof of such publication and of the character of the land; (4) pay the purchase money and fees. Every one of these things is necessary to an entry.

How then can it be said that when it is charged the defendants conspired to procure others to make entries, the making of applications is not included?

It is a familiar rule that " on demurrer to a complaint as defective, in that it does not state facts sufficient to constitute a cause of action, the complaint must be liberally construed." (Ency. of Pleading & Practice, vol. 6, p. 346.) The same rule applies upon demurrer to an indictment. " An indictment is to a criminal action what a declaration is to a civil action. And when the criminal law is silent as to the form of an indictment, in any particular case, resort may be had to the rules and principles which are applicable to the structure of a declaration in a civil action." (Gould on Pleadings, 5th Ed., p. 493; Heard Criminal Pleadings, p. 29; *State* v. *Hand*, 1 Eng. (Ark.), 165.)

In the early case of *Chotard* v. *Pope* (12 Wheat., 586) this court discussed the meaning of the word " entry " when used in land matters. It was there said:

> The term *entry*, as applied to appropriations of land, was probably borrowed from the State of Virginia, in which we find it used in that sense at a very remote period. Many cases will be found in the reports of the decisions of this court, in which the title to western lands were drawn in question, which will show how familiarly and generally the term is used by court and bar. Its sense, in the legal nomenclature of this

> country, is now as fixed and definite as that of many terms borrowed from the common law. *It means that act by which an individual acquires an inceptive right to a portion of the unappropriated soil of the country by filing his claim* in the office of an officer known, in the legislation of several States, by the epithet of an entry taker, and corresponding very much in his functions with the registers of land offices under the acts of the United States.

This definition has been frequently quoted with approval and applied. (See Rose's Notes on United States Reports.)

In the *Dealy case* (152 U. S., 539) this court passed upon the meaning of the word "enter" as used in an indictment charging a conspiracy to defraud the United States of lands open to entry under the homestead laws. It was there said (p. 545):

> The argument is that the word "entry," having a technical meaning, must be taken with that meaning in this indictment; that, as thus understood, an entry in a homestead case being but a preliminary act, does not operate to divest the title of the Government, and, as is said in the brief: "The charge that defendants conspired to defraud the Government by means of false entries to lands under the homestead laws will thus be seen to be a charge of an innocent act."
>
> But the popular understanding of the word is not thus limited. It is common to

> speak of an entry of land under the homestead law, meaning thereby not a mere preliminary application, but the proceedings as a whole, the complete transfer of title. Counsel concede that in cash purchase and preemption cases it is even technically used to describe the final proof or final purchase, but seek to draw a distinction between its use in those cases and under the homestead law. *Even if it were conceded that such a distinction is recognized in the statutes and authorities, it would not change the significance of the popular use.*

The Standard Dictionary gives the following as one meaning of the word "entry:"

> The filing of a prescribed application at a land office for the right to buy or preempt government lands.

The Century Dictionary says it means—

> In relation to public lands, the filing of a written application in the proper land office, in order to secure a right of purchase.

It is a familiar rule that "in interpreting the language of a pleading, the words used must be construed according to their popular sense." (Ency. Pleading & Practice, vol. 14, p. 748.) The Dealy case is therefore conclusive that the word "entries," as used in these indictments, means the whole proceeding by which title to lands is acquired from the United States, including the application. But even if we give the word a technical meaning, definition of which is given in *Chotard* v. *Pope*

(*supra*), it must be held to include the application. Whichever of the two definitions adopted by this court, one giving the popular and the other the technical meaning, is applied in these cases, the result is the same, for they both embrace the application.

The indictments charge that defendants conspired to obtain from the United States lands which "were surveyed *vacant public* lands *of the said United States* * * * lands which *had not been offered at public sale* according to law, and which were * * * *open to entry* at the land office." From these allegations it is clear that when the conspiracy was formed no application had been made for the lands which were to be obtained. In order to carry out the conspiracy it would, therefore, be necessary to have applications made. It follows that when defendants conspired to procure others to "make entries," as charged, they necessarily contemplated the making of applications. Reasonable implications from facts clearly charged may be indulged in to ascertain the true meaning of an indictment. *United States* v. *Mills,* 7 Pet., 138; *Rosen* v. *United States,* 161 U. S., 30, 33; *Clements* v. *United States,* 149 Fed., 305; *Potter* v. *United States,* 155 U. S., 438, 448; ex parte Pierce, 155 Fed., 663, 665.

The indictments charge that the defendants were to obtain lands for the corporation *from the United States,* not from entrymen having a legal

right to convey. The Government ought to be given an opportunity to prove before a jury that the lands were, in fact, to be obtained *from the United States.*

The word "entries" in the indictments does not have the same meaning as the word "enter" in section 3 of the act. As used in that act "to enter" means to go into possession. It can mean nothing else, for after the purchase price and fees have been paid nothing remains to be done by an entryman to pass title to him. Subsequently to payment a patent may be obtained as evidence of title, but title passes upon payment. There is no other act except the going into possession that it could apply to. To undertake to give it another meaning makes it meaningless. The language of the indictments is "make entries as individual entrymen, *at the land office aforesaid, with the said register.*" Manifestly "entries" as here used does not mean the act of going into possession, but refers to all acts necessary to make what is popularly known in land matters as an entry.

There is another reason why the contention of defendants that "entries" in the indictments should be given the same meaning as "enter" in section 3, viz: the entry which the applicant is permitted to make after advertisement and proof, is incorrect. It must be conceded that the overt acts alleging that defendants, in pursuance, and to effect the object, of the conspiracy, procured others to file

papers called "Testimony of claimant" show an intention that the words "make entries" shall include proof. There is nothing in the charging part of the indictments that could be construed as referring to the "Testimony of claimant" except the words "make entries." It is true that the charging part of the indictments does not specifically state that defendants conspired to procure others to make applications for the lands. Neither does it specifically say that defendants conspired to procure others to file papers known as "Testimony of claimant." It can not reasonably be contended that "entries" does not include the latter. Why, then, does it not include making applications, which is an equally important and essential part of an entry as the "Testimony of claimant?" The fact that in reciting the overt acts the "Testimony of claimant" is mentioned while making applications is not referred to is unimportant. Section 5440 requires proof of an act done to carry out the conspiracy. Consequently one overt act had to be alleged. Beyond that it was unnecessary to go. The mere fact that the pleader has seen fit to set out some acts and omit others is without significance, and to say that by doing so he has limited the plain meaning of words used in the charging part is clearly erroneous. An attempt to draw inferences from such omission would take us into the realm of speculation, and we submit that inquiry into the reason for such omission is irrelevant.

If "entries" is construed as including making applications, the indictments charge in substance that defendants conspired to obtain lands from the United States by procuring entrymen falsely to swear to things required by section 2 of the law to be sworn to. We understand it to be conceded that if this is so, a conspiracy to defraud the United States is charged. Certainly it can not be seriously questioned. The District Court said that if section 2 is circumvented it "would amply fill the demands of the second clause of section 5440."

III.

A conspiracy to defraud is sufficiently charged, although the conspiracy did not embrace the making of false and fraudulent applications.

If the court holds that the conspiracies charged embrace only acts done subsequently to the making of applications, it must be held that the indictments sufficiently charge a conspiracy to defraud the United States.

According to such construction of the indictments, we would have this situation: A number of entrymen have, in conformity with section 2 of the timber and stone act, made applications to enter lands under that act. No violation of that section or of section 3 being alleged, we may disregard them, leaving for consideration the provision of section 1, that lands shall not be sold to one person or association in excess of 160 acres. Under the decision of the Williamson case, each of the applicants has

the right to contract in good faith to convey the lands, after patent; the sale of the lands by the United States has not occurred; the application is merely notice that the person making it desires at some subsequent time to purchase the land; the sale of the land by the United States is to occur subsequently, after final proof, when the purchase price is paid and receipts are taken.

Now, section 1 of the act provides that timber lands "may be sold * * * in quantities, not exceeding one hundred and sixty acres, to any one person or association of persons." It is clear that a corporation could not, without violating this section, step into the shoes of the various applicants and in its own name take the steps which the law requires for completion of the entries, for this would result in a sale of more than 160 acres to one association. But this is what the indictments charge that the defendants conspired to do, except that it is alleged that they planned that the applicants should complete the entries "as individual entrymen," that is, in their own names, and without disclosing the interest of the corporation. When the applicants should pay the money which the corporation would furnish them they would be acting merely as the agents of the corporation, and in each case the sale which would be made by the United States would, in fact, be, not to the entrymen, but to the corporation. Certainly this is not a bona fide contract by an entryman to convey

after patent and what is said in the Williamson case about such right of an entryman is not applicable here.

In a case where an applicant has made a bona fide contract to convey when he has acquired title it would not be contended that the United States *sold* the lands to the person taking title under conveyance made pursuant to the contract. In such case there would be no privity between the latter and the United States. The applicant would still continue to act for himself and to deal with the United States solely for his own benefit, and the United States would know no other person in the transaction. But the indictments in these cases charge, in substance, that the applicants were in the subsequent steps to cease acting for themselves and to become merely the agents and tools of the corporation, and that the Government while led to believe that it was selling to the applicants, acting in their own behalf, were, in fact, selling the lands to their principal, a corporation, which could not lawfully acquire the lands.

In *United States* v. *Budd* (144 U. S., 154) Mr. Justice Brewer said (p. 163):

> All that it (the timber and stone act) denounces is a prior agreement, *the acting for another in the purchase.* If *when the title passes from the Government* no one save the purchaser has any claim upon it, or any contract or agreement for it, the act is satisfied.

This language is peculiarly applicable to the present case, for there can be no doubt that the indictments charge that the entrymen were acting for the corporation at the purchase, if not at a previous stage of the entry. Unless this language of Mr. Justice Brewer is to be disregarded the indictments must be held to charge crimes.

United States v. *Trinidad Coal Co.* (137 U. S., 160) is directly in point. In that case the Government sought to set aside patents to 6 tracts of coal land obtained by defendant through "dummy" entrymen, two of whom were its officers and four its employees. It was charged that the lands obtained through the employees were acquired fraudulently because the name of the real purchaser, the defendant, was not disclosed. The patents obtained by the employees were set aside on the ground of fraud. The decision in that case is grounded upon the limitation contained in the statute that coal lands may be entered in quantities not exceeding one hundred and sixty acres to each individual or three hundred and twenty acres to an association.

Replying to a contention that the scheme was not within the statute, Mr. Justice Harlan said:

> This contention can not be sustained unless the court lends its aid to make successful a mere device to evade the statute. The policy adopted for disposing of the vacant coal lands of the United States should not be frustrated in this way. It was for Congress to prescribe the conditions under which indi-

viduals and associations of individuals might acquire these lands, and its intention should not be defeated by a narrow construction of the statute. If the scheme described in the bill be upheld as consistent with the statute, it is easy to see that the prohibition upon an association entering more than 320 acres, or entering and holding additional coal lands, where one of its members has taken the benefit of its provisions, would be of no value whatever. It is true, in the present case, that some of the persons who made the entries in question were not, strictly speaking, members of the corporation, but only its employees. But as they were parties to the alleged scheme, and were, in fact, agents of the defendant in obtaining from the Government coal lands that could not rightfully have been entered in its own name, that circumstance is not controlling. * * *

There is, consequently, in view of all the allegations of the bill, no escape from the conclusion that the lands in question were fraudulently obtained from the United States. We say fraudulently obtained because if the facts admitted by the demurrer had been set out in the papers filed in the land office the patent sought to be canceled could not have been issued without violating the statute. *The defendant would not have been permitted to do indirectly that which it could not do directly.*

The coal land statutes did not require the applicant to make an affidavit at entry that he was pur-

chasing solely for his own benefit; neither does the timber and stone act require such an affidavit to be made at the time when the lands are *purchased* from the United States. Both of those statutes contain prohibitions against one person acquiring from the United States more than a certain quantity of land. It was this prohibition which made the plan described in the Trinidad case unlawful. It is this prohibition which makes the conspiracies of defendants conspiracies to defraud. The plan carried out by the Trinidad Coal Company was held to be fraudulent because, in the language of the court, the coal company in obtaining from the United States lands in excess of the quantity permitted by law did "indirectly that which it could not do directly." This is the very thing with which defendants in the present cases are charged. It is alleged that defendants conspired "indirectly to obtain from the United States for a certain corporation * * *, a large quantity * * * of timber lands in excess of the quantity of such lands which the said corporation could lawfully obtain directly from the United States." To do this was, according to the Trinidad case, a fraud upon the United States. The end, *fraud,* being unlawful it was unnecessary to set out in these indictments, in detail, the means of indirection contemplated by the conspiracies. *Dealy* v. *United States,* 152 U. S., 539, 543; *Burton* v. *United States,* 202 U. S., 344, 372 and cases there cited; *Thomas* v. *United States,* 156 Fed., 897, 906; *United States* v. *Grunberg,* 131

Fed., 137; *Thomas* v. *People,* 113 Ill., 131; *People* v. *Bird,* 126 Mich., 631. However, in the last paragraph before the overt acts the means, in a general way, are set out and these allegations, as already stated, show that it was the intention of defendants to induce the United States to sell the lands to the corporation through persons making entry as individual entrymen without disclosing the fact that the corporation was the real purchaser.

IV.

A conspiracy to obtain public lands from the United States in excess of the area allowed by law is a conspiracy to defraud within Sec. 5440, U. S. R. S.

If the Government's contention that the conspiracies contemplated a violation of the timber and stone act, even if they did not embrace the making of applications, is correct, a conspiracy to defraud is charged within the meaning of section 5440. The District Court's holding that a conspiracy to defraud, punishable under this statute, is a common-law conspiracy to defraud and must involve base moral turpitude is erroneous. This point was fully discussed upon argument of the Coal Land Cases (supra), and is dealt with on pages 19 to 42 of the Government's brief in those cases. We beg to refer the court to the argument there made, in order to avoid what we regard as an unnecessary repetition in view of the fact that the Coal Land Cases were so recently submitted to the court.

V.

The offenses charged are not barred by the statute of limitations.

The principal question here involved was thus stated by the Circuit Court of Appeals for the Eighth Circuit in *Ware* v. *United States* (154 Fed., 577):

> Where the conspiracy was formed and an overt act was done in pursuance of it more than three years prior to the indictment, and overt acts were subsequently done in the execution of it within the three years, may one of the conspirators be successfully prosecuted for it?

The Circuit Court of Appeals, after a most careful consideration and discussion of the question and the conflicting cases, answered the question affirmatively. A petition for certiorari in that case, based largely upon this question, was denied (207 U. S., 588). The Court of Appeals, in its opinion, said:

> The offense under section 5440 is the conspiracy, not the conspiracy and the overt act. "The provision of the statute," says the Supreme Court, "that there must be an act done to effect the object of the conspiracy, merely affords a locus penitentiæ, so that before the act done either one or all of the parties may abandon their design, and thus avoid the penalty prescribed by the statute." (*U. S.* v. *Britton,* 108 U. S., 199, 205, 2 Sup. Ct., 525, 27 L. Ed. 703.) So that there is a locus penitentiæ after the performance of

each overt act and a presumption of the innocence of the defendant, and if, after the performance of the first overt act, a defendant abandons the design of the conspiracy, and the prosecution of the conspiracy and of the first overt act becomes barred by the statute, the overt acts of other conspirators within the three years in the performance of the old conspiracy without the conscious participation of the defendant ought not to charge, and can not charge him with the offense, because they fail to evidence his intent to violate the law within the three years.

On the other hand, the offense denounced by section 5440 is not the mere formation, but the existence, of the conspiracy and its execution. And if by the agreement, or by the joint assent of the defendant and one or more other persons, within the three years, the unlawful scheme of the conspiracy is to be prosecuted, and an overt act is subsequently done to carry it into execution, the mere fact that the same parties had conspired and had wrought to accomplish the same or a like purpose, more than three years before the filing of the indictment, ought not to constitute, and does not constitute, a defense to the charge of the conspiracy within the three years.

In *Jones* v. *United States* (162 Fed., 417) a petition for certiorari, relying mainly upon this same question, was denied at the present term of this court.

In *Bradford* v. *United States* (206 U. S., 563) this court refused to issue a writ of certiorari upon a petition, relying upon the same point as the sole ground for the request. Judge Parlange, in his opinion, said (148 Fed., 413, 417):

> But I am absolutely unable to agree that if, after committing the first overt act, the conspirators do nothing more for three years, and they are not prosecuted within that time, they can thereafter continue the conspiracy, or renew it either publicly or secretly and as often as they please, and that they can commit as many acts as they choose to effect the object of the conspiracy, and yet have absolute immunity from prosecution for the conspiracy. It is well settled, as I have already said, that the overt act need not itself be an offense. It might therefore be absolutely noncriminal per se, and, being such, it could not attract the attention or arouse the suspicion of the Government. *That immunity from prosecution for the conspiracy would result from the lapse of three years after the commission of the first overt act, although the conspiracy were thereafter continued or repeatedly renewed and many other overt acts committed under it, is, to my mind, an utterly irrational conclusion, which the law could never have contemplated.*

In *Lorenz* v. *United States* (196 U. S., 640) a petition for certiorari was based, in part, upon the same question, the petition being denied. In that

case the Court of Appeals for the District of Columbia said, inter alia (24 Appeal Cases, D. C., 337, 387):

> The contention on behalf of the appellants is that if the conspiracy was in fact formed, and a single act in aid of its object committed more than three years before the finding of the indictment, then the offense was barred by the statute of limitations, and that no other like act or acts committed within three years would amount to a renewal or continuance of the conspiracy so as to remove the bar.
>
> We can not agree with this contention. Undoubtedly, as argued, the conspiracy is the gist of the offense defined in section 5440, Revised Statutes, though it is not indictable until some act shall have been done by one or more of the conspirators to effect the object of the corrupt agreement. The offense is then complete as to that act and the statute at once begins to run; but it does not follow that all similar acts thereafter may be committed with impunity. Through the repetition of such acts—overt acts, as they are commonly called—the conspiracy is made a continuing offense. By each subsequent act it is repeated and entered into anew. (*People* v. *Mather,* 4 Wend., 259; *Com.* v. *Bartilson,* 85 Pa. St., 482, 489; *Insurance Co.* v. *State,* 75 Miss., 24, 35; *Ochs* v. *People,* 25 Ill. App., 379, 414; 124 Ill., 399, 426; *United States* v. *Greene,* 115 Fed. Rep., 343.)

These numerous denials of a writ of certiorari in cases involving a question which, both because of its importance and the diversity of opinions in the lower courts, would have called for its issuance, can only be regarded as an affirmance of the decisions of the courts of appeals upon the merits of the question. The question may, therefore, be properly disposed of upon the principle of *stare decisis.*

The view expressed by the courts in the above-cited cases rests on the theory that a conspiracy continues until the purpose of the crime has been either accomplished or abandoned; that whenever concerted overt acts are committed at a subsequent period which show that the parties to the crime are still pursuing their mutual design, such overt acts in themselves constitute a continuance or a renewal of the conspiracy.

A conspiracy is always difficult to prove and can rarely be established by direct proof, owing to the fact that the conspirators, as a general rule, are careful to conceal their intentions. Therefore, their design in the conspiracy itself must be shown by their acts. While at common law the conspiracy alone constitutes the offense, and it is not necessary to allege or prove an overt act, under section 5440 the offense can not be prosecuted until an overt act is committed. Accordingly, the statute of limitations begins to run from the date of the commission of the first overt act, *so far as regards that conspiracy and that act,* but it does not follow because the conspirators may do nothing further for

three years and during that time are not discovered and prosecuted, that they are, therefore, safe from prosecution and may continue the conspiracy or renew it at will and commit with impunity as many overt acts in furtherance of their design as they see fit.

A proper view of the crime of conspiracy may be obtained by considering it in connection with the subject of jurisdiction or venue. It is well settled that the venue in a criminal case must be laid in the county where the offense is committed, but in an indictment for conspiracy the venue may be laid in any county where it can be proved an overt act was done by any of the conspirators in furtherance of their scheme. (*Rex.* v. *Brisac,* 4 East, 164; *People* v. *Mather,* 4 Wend., 229, 259.)

Even when a conspiracy is formed and completed in one State and one of the conspirators afterwards goes into another State, and in pursuance of the conspiracy does an overt act, such conspiracy is renewed and an indictment will lie in the State where the overt act was committed. (*Noyes* v. *State,* 41 N. J. Law, 418.)

This rule is based upon the theory that the law regards the agreement itself and not the mere act of agreeing as the crime, and if after agreeing the conspirators or any of them go into another county and there commit an overt act, such act is regarded as a renewal or continuance of the illegal combination and proof of its existence where the overt act

is committed. (See cases above cited and Amer. and Eng. Enc. of Law, vol. 6, p. 844.)

Numerous other authorities, federal and state, might be cited directly in support of the Government's contention that conspiracy is a continuing offence until its purpose is accomplished or abandoned, and that each new overt act committed in pursuit of the common object is proof that the conspiracy is still in operation or that there is a renewal of the conspiracy, and that the prosecution thereof is not barred if any overt act has been committed within the statutory period.

Attempt is made to distinguish the cases above cited in which petitions for certiorari were denied from the present cases by saying that in the former the indictments alleged that the conspiracy was formed as well as that the overt acts were done within three years of the finding of the indictment, while in the present cases the indictments allege the formation of the conspiracies and the performance of some overt acts more than three years before the return of the indictments. But this certainly is immaterial. In the previous cases the Government was allowed to prove the existence of the conspiracy and the performance of acts to effect its object more than three years before the finding of the indictments. The only difference, therefore, between those cases and the present cases is that only part of the conspiracy and of its performance were set out in the indictments in the former, while, *by way of inducement,* and in order that defendants may

have knowledge of all the acts which the Government expects to prove upon the trial, the whole of the conspiracies are set out in the latter. Surely this is an immaterial difference and, as shown by the above quotation from the Ware case, the same question is involved in both. The Government does not expect to try the defendants for any conspiracy existing more than three years before the indictments were returned. The agreement, if any, of which defendants will be convicted under these indictments is a conspiracy to defraud the United States, existing within three years of the return of the indictments, overt acts to effect its object within said three years being shown. But in the trial of these cases the Government expects to prove the existence of the conspiracy and acts done pursuant to it prior to the three-year period. Under the decisions the Government clearly has the right to do this. The fact that the pleader in stating the crime with which defendants are charged has set out by way of inducement, and as giving the full history of the crime, acts which the Government expects to prove at the trial but which it does not rely upon as in themselves constituting a crime of which defendants could, under the indictments, be convicted, certainly should not be held to vitiate the indictments.

In No. 289 the only act to effect the object of the conspiracy alleged to have been committed within three years of the finding of the indictment was procuring the execution of a deed by Barth, to

whom all lands acquired by the entrymen had been conveyed, to the New Mexico Lumber Company as grantee. The District Court held that this was not done to effect the object of the conspiracy. We are unable to understand by what logic this conclusion could be reached. Without this act the conspirators would have been defeated in achieving the very purpose for which the conspiracy was formed and for which all other acts were done, namely, to get into the corporation (the New Mexico Lumber Company) title to public lands in excess of the quantity it could lawfully acquire directly from the United States. The execution of this deed was the link necessary to complete the chain of the conspiracy. The conspiracy at its inception and throughout its performance contemplated the execution of this deed, and without it the object of the conspiracy to enable the New Mexico Lumber Company to acquire title to the lands in question would have failed of accomplishment. The execution of this deed was as much contemplated by this conspiracy and as necessary to effect its object as the making of final proof or payment of the moneys by the entrymen or the obtaining of patents from the United States or any other act charged to have been done.

VI.

The indictments are not duplications.

The District Court considered the indictments as charging the formation of several different conspiracies upon the different dates set out in the

overt acts. But the language of the indictments makes it clear, beyond question, that what is charged is a single conspiracy continuing down to the finding of the indictments. The indictments are all alike in this respect. In No. 289 the indictment charges that the defendants, on August 25, 1899, "and at the several times of the committing of the several acts hereafter in this indictment mentioned, and *continuously at all times between the said 25th day of August in the year last aforesaid and the day of the presenting of this indictment,*" conspired, etc. In each of the overt acts it is alleged that something was done in pursuance of and to effect the object of the said conspiracy, the singular and not the plural being used, thus showing that each overt act is alleged to have been committed as a part of one and the same conspiracy. Again, in the conclusion of the indictment emphasis is laid upon the fact that a single continuing conspiracy is charged. It is there stated that defendants, on August 25, 1899, "and from thence hitherto, and at the several times of the committing of the said several overts acts in this indictment charged (the said conspiracy during all the time from the said day when the same was originally entered into, to-wit, the said 25th day of August in the year 1899, to the date of the presenting of this indictment, being still continuing and in existence) in the manner and form," etc., conspired.

In view of this language it seems idle to discuss the question suggested that several conspiracies are charged.

It is apparent that the holding of the court, as well as the suggestion that two offenses, one com-

mitted before and one within three years of the finding of the indictments, is erroneous. As to this latter suggestion, it may be added that whatever is alleged as to the existence of the conspiracy and acts done pursuant to it more than three years before the return of the indictments is mere inducement and manifestly not intended to charge a separate and distinct crime.

VII.

The indictments are certain and definite.

In questioning the certainty and definiteness of these indictments, the following well-established rules of criminal pleading have been ignored:

In *Cochran and Sayre* v. *United States* (157 U. S., 286, 290) it was said:

> But the true test is, not whether it might possibly have been made more certain, but whether it contains every element of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.

In *Tubbs* v. *United States* (105 Fed., 59, C. C. A.), it was claimed that the papers forming the basis of the indictment should be set out. The court there said:

> Defendants in this class of cases commonly affect ignorance of what they are indicted for, and great apprehension lest they shall be indicted a second time for the very same offense, and be unable to prove by the record a former conviction or acquittal. No case of the kind has ever occurred, or is ever likely to occur, but the affected apprehension of each defendant that it may occur in his case is perennial. The Supreme Court has put a quietus on these stock objections by repeatedly pointing out that the defendant may apply for a bill of particulars (*Rosen* v. *United States*, 161, U. S., 29, 34, 35, 39–41; *Durland* v. *United States*, 161 U. S., 306, 315), and that parol evidence is always admissible, and sometimes necessary, to establish the defense of prior conviction or acquittal. (*Dunbar* v. *United States*, 156 U. S., 185, 191; *Durland* v. *United States*, 161 U. S., 306, 314, 315.)

A mere reading of the indictments shows that they are sufficiently certain in every particular to meet all requirements of the law.

In the Sullenberger indictment a clerical error seems to have been made in referring to the overt acts for descriptions of the lands which were to be obtained. The lands are described in overt acts Nos. 1 to *19*, both inclusive, instead of 1 to *18*, as stated in the indictment. But, surely, this error will not vitiate the indictment. If the Government is not entitled to offer proof upon overt act No. 19

because of this clerical error that overt act may be treated as surplusage. Whatever view is taken, the descriptions of the lands remain certain.

The judgments of the District Court should be reversed and the cases remanded for trial.

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Special Assistant to the Attorney-General.

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Supreme Court, U. S.
FILED.
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CLERK

Nos. 288 and 289.

In the Supreme Court of the United States.

OCTOBER TERM, 1908.

No. 288.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

vs.

CHARLES H. FREEMAN, EDGAR M. BIGGS AND WELCH W. NOSSAMAN, DEFENDANTS IN ERROR.

No. 289.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

vs.

EDGAR M. BIGGS, CHARLES H. FREEMAN, CHARLES D. McPHEE AND JOHN J. McGINNITY, DEFENDANTS IN ERROR.

(Nos. 627 and 628, October Term, 1907.)

In Error to the District Court of the United States for the District of Colorado.

BRIEF AND ARGUMENT OF DEFENDANTS IN ERROR.

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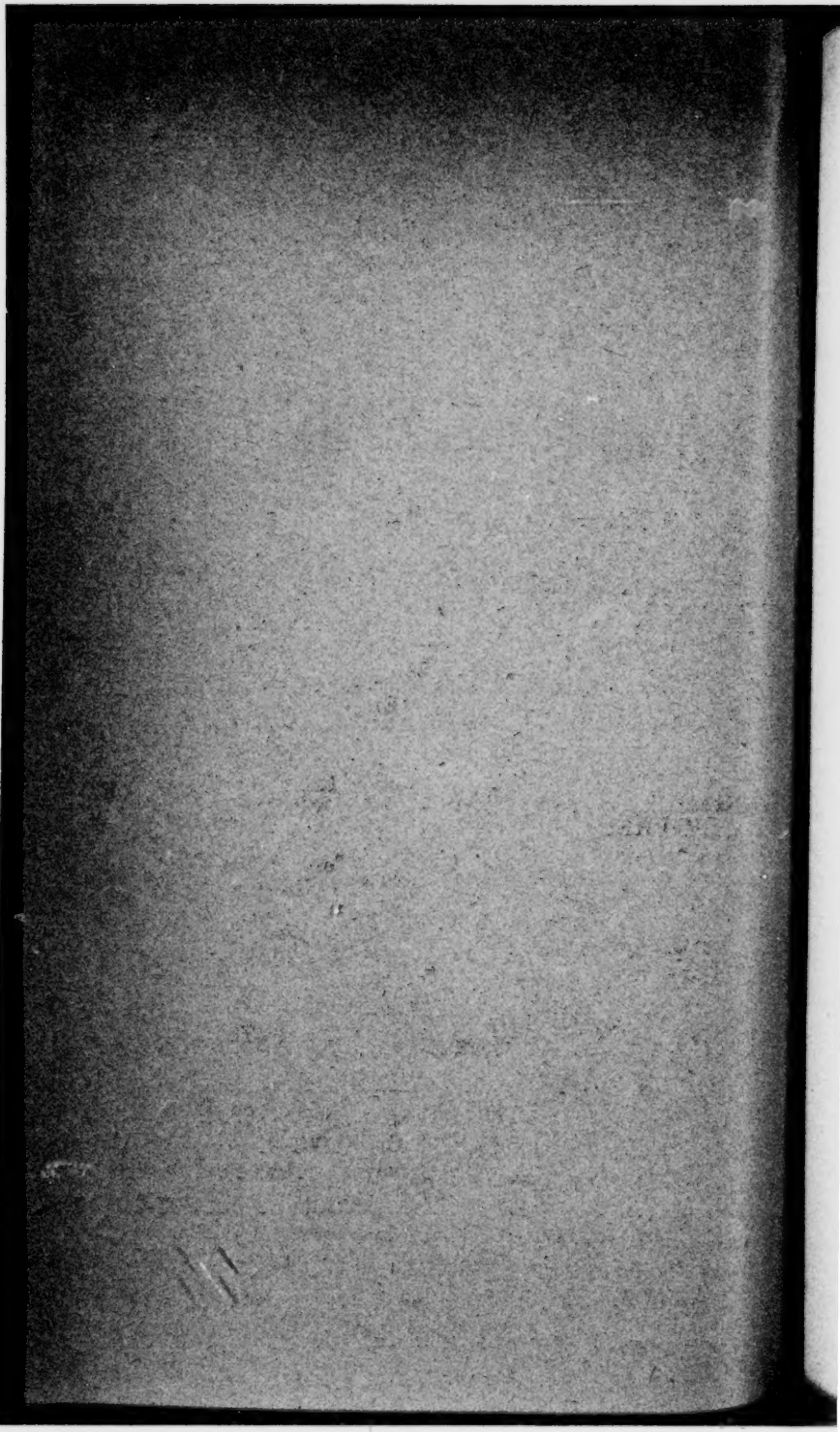

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BRIEF AND ARGUMENT OF DEFENDANTS IN ERROR.

I.

STATEMENT OF CASE.

The two indictments under consideration are asserted by the Government to be based upon the provisions of section No. 5440, of the Revised Statutes of the United States, as amended

by an act of May 17, 1879; 21 Statutes at Large, page 4; 1 Supp. Revised Statutes, page 264, and as it appears in

3 Compiled Statutes U. S., 1901, page 3676, and
2 Federal Statutes Annotated, 247.

The portion of this statute material to be considered in this connection is as follows:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty."

In most particulars and in substance the two indictments above mentioned are identical, and we will copy therefrom all portions which seem to us to be in any way material to be considered in disposing of these cases.

The indictment in U. S. vs. Freeman et al. (No. 627) charges

"that Charles H. Freeman, Edgar M. Biggs and Welch W. Nossaman, * * * on the thirtieth day of March, in the year nineteen hundred and one, and at the several times of the committing of the several overt acts hereafter in this indictment mentioned, and continuously at all times between the said thirtieth day of March, in the year last aforesaid, and the day of the presenting of this indictment, * * * unlawfully, corruptly, wickedly and maliciously did conspire, combine, confederate and agree together, and with divers other persons to the said grand jurors unknown, indirectly to obtain from the said United States, for a certain corporation, to wit, The New Mexico Lumber Company, * * * a large quantity, to wit, seventeen hundred and sixty acres of timber lands in excess of the quantity of such lands which the said corporation could lawfully obtain directly from the said United States, regard being had to the *laws* thereof pertaining to the entry and sale of such lands; which said timber lands so to be obtained then were * * * surveyed vacant public lands of the said United States." (Record, pages 1-2.)

The indictment then, by way of recital only and not by direct allegations, indicates that these lands were not in any mil-

itary, Indian or other reservation, had not been offered at public sale, were unfit for cultivation and were chiefly valuable for timber and were open to entry at the Durango Land Office, "under the *laws* of the said United States pertaining to the entry and sale of timber lands," and under land office regulations; "descriptions of which said lands by legal subdivisions are set forth in that part of this indictment where the said Charles H. Freeman and Welch W. Nossaman are charged with the committing of overt acts in procuring the execution and verification of certain documents, each entitled 'Testimony of Claimant,' by certain persons respectively in those documents named, for presentation by them" to the Durango Land Office and to the General Land Office, "in connection with the entry of the same lands by those persons in quantities allowed to them respectively by law." (Record, page 2.)

These statements so made are immediately followed by the further allegations,

"that the said timber lands were so to be obtained as aforesaid from the said United States, for the said corporation, by the said defendants soliciting and procuring the persons aforesaid, for hire and under agreements with them separately to that end,

"(1) to pay to the Receiver of the said land office, with moneys to be furnished to them by the said corporation, the price fixed by law therefor;

"(2) make entries as individual entrymen, at the land office aforesaid, with the said register, of tracts of such lands in quantities respectively not exceeding the quantities allowed by the said laws and regulations;

"(3) secure patents from the said United States for the said lands to themselves as such entrymen,

"(4) and make conveyance of the title to the said lands to the said corporation." (Record, page 2.)

This indictment then contains, under the title "Overt Acts," twenty-four supposed statements of alleged overt acts, "in pursuance of the said unlawful, corrupt, wicked and malicious conspiracy, combination, confederation and agreement, and to effect the object of the same," in twenty-four paragraphs, and thereafter concludes:

"And so the grand jurors aforesaid, upon their oaths aforesaid, do say, that the said Charles H. Freeman, Edgar M. Biggs

and Welch W. Nossaman, on the said thirtieth day of March, in the year nineteen hundred and one, and from thence hitherto, and at the several times of the committing of the said several overt acts in this indictment charged (the said unlawful, corrupt, wicked and malicious conspiracy, combination, confederation and agreement, during all the time from the said day when the same was originally entered into, to wit, the said thirtieth day of March, in the year nineteen hundred and one, to the date of the presenting of this indictment, being still continuing and in existence), in manner and form in this indictment aforesaid, unlawfully, corruptly, maliciously and wickedly did conspire, combine, confederate and agree together, and with others, indirectly, deceitfully and fraudulently, to obtain from the said United States, for the said corporation, certain of the public lands and property of the said United States in quantity greatly in excess of the quantity which the said corporation could lawfully obtain directly from the said United States under a proper and lawful administration of the said laws and regulations, and thereby, and in that manner, defraud the said United States of its valuable property in such lands, and also of its governmental function in the matter of preserving and disposing of the same lands, as well as out of its right to administer an intelligent and honest service in that behalf in the interests of the people of the said United States." (Record, pages 12-13.)

So far as charging any fact necessary or material to the indictment is concerned, we contend that the paragraph last quoted, beginning "and so the grand jurors aforesaid," is of no force or effect, it being a mere legal conclusion of the pleader, and insufficient, under the law of criminal procedure, to charge any material fact.

Drake vs. The State, 19 Ohio St., 211, 216-7.
Fouts vs. The State, 8 Ohio St., 98, 118-123.

So far as the foregoing allegations are concerned, the indictment in U. S. vs. Biggs et al., No. 628, is identical in its verbiage with the indictment from which we have quoted above, except as follows:

First. Indictment in U. S. vs. Biggs et al. charges the conspiracy to have been entered into by Edgar M. Biggs, Charles H. Freeman, Charles D. McPhee and John J. McGinnity.

Second. Fixes the date of the inception of the conspiracy at August 25, 1899.

Third. Instead of alleging that the entrymen were to convey to the corporation named, it alleges that the entrymen were to

"(4) Make conveyances of the title to the said lands to one William Barth, an agent and trustee for the said corporation,

"(5) and by the said defendants requiring the said William Barth to convey such title to the said corporation." (Record, page 2.)

This indictment contains only eight paragraphs alleging supposed overt acts. (Record, pages 3-7.)

Returning now to the indictment in U. S. vs. Freeman et al., under the title of "Overt Acts," the indictment sets forth eleven supposed overt acts, the material portion of the first being as follows:

"That, further, in pursuance of the said unlawful, corrupt, wicked and malicious conspiracy, combination, confederation and agreement, and to effect the object of the same, the said Charles H. Freeman afterwards," on the very day of the alleged formation of the alleged conspiracy, to wit, on March 30, 1901, at Durango, Colorado, "unlawfully did, by solicitation and promise of reward to him in the sum of seventy-five dollars, induce and procure one Leslie W. Smith to execute and verify by his oath, before the said register, a certain document in the form prescribed by law, and entitled "Testimony of Claimant," for presentation by the said Leslie W. Smith" to the officers of the Durango land office, and the general land office in connection with the entry by said Smith at said Durango office of lands specifically described. (Record, page 3.)

Overt acts numbered from two to eleven, inclusive, in this indictment, and numbered from one to seven, inclusive, in the indictment in U. S. vs. Biggs et al., are identical in their verbiage with the one above quoted, except dates, sums paid to parties, names and description, and except that overt acts numbered four and five in indictment in U. S. vs. Freeman et al. are charged to have been done by Welch W. Nossaman. In no case is more than one person named as having done any of these

overt acts, and all save the two last mentioned are charged to have been done by the defendant Charles H. Freeman. In some cases the oath is said to have been taken before the Receiver instead of the Register, and there may possibly be other slight variances, but we are sure there are none which are at all material.

The dates in all of the overt acts, relating to the entry of the lands in question, mentioned in the indictment in U. S. vs. Freeman et al., are alleged to have been in the year 1901, and are severally between March 30 and August 12, 1901.

In the indictment in U. S. vs. Biggs et al. the seven overt acts therein charged are alleged to have been committed in 1899, the dates extending from August 25th to October 11th. In both indictments the sums claimed to have been paid to the various entrymen, to procure them to make the entries, are in some cases specifically stated, in other cases alleged to have been small sums to the grand jurors unknown.

In the indictment in U. S. vs. Freeman et al. the paragraphs under the title "OVERT ACTS," numbered from twelve to twenty-two, inclusive, are identical in form, and charge: "That further, in pursuance of the said unlawful, corrupt, wicked and malicious conspiracy, combination, confederation and agreement, and to effect the object of the same, the said Charles H. Freeman, Edgar M. Biggs and Welch W Nossaman afterwards, to wit:" on May 5, 1905, at Washington, D. C., "unlawfully did cause and procure the issuance by the said United States of a patent for the lands described in overt act numbered * * * " and these relate respectively to the overt acts numbered from one to eleven, which have been already mentioned, and allege that the patents, respectively, ran to the respective entrymen named in said overt acts. (Record, pages 7-10).

The indictment in U. S. vs. Freeman et al. alleges, as Overt Acts Nos. 23 and 24, that defendant, Welch W. Nossaman, "Further, in pursuance of the said unlawful, corrupt, wicked and malicious conspiracy, combination, confederation and agreement, and to effect the object of the same," on February 19, 1907,

at Pagosa Springs, Colorado, "unlawfully did require and procure" Mark Todd and William H Norton, respectively (who are the entrymen named in the alleged Overt Acts Nos. 4 and 5, wherein Nossaman was charged with inducing and procuring them, respectively, to execute and verify the documents entitled, by the pleader, "Testimony of Claimant,") "to sign and execute a certain deed of conveyance * * * conveying the title to" the lands entered by each of said entrymen, severally, to The New Mexico Lumber Company, and each deed is set out in full, *in hacc verba.* (Record, pages 10-12.)

These two paragraphs are identical in form and verbiage, one being devoted to the alleged conveyance by Todd and the other to the like conveyance by Norton; and in neither case is it alleged that the deed was ever delivered or that title really passed to the company.

The indictment in U. S. vs. Biggs et al. contains nothing resembling paragraphs Nos. 12 to 22 in the other indictment, relating to procurement of patents. There is nothing in this indictment which charges that entries were allowed at the Land Office or that patents were issued to any person or persons; but in Overt Act No. 8 it is alleged that defendants McPhee and McGinnity, on May 15, 1906, at Denver, Colorado, "further, in pursuance of the said unlawful, corrupt, wicked and malicious conspiracy, combination, confederation and agreement, and, to effect the object of the same, * * * unlawfully did request and require the said William Barth to sign and execute a certain deed, to wit, a quit-claim of him, the said William Barth, conveying the title to all the lands described" in Overt Acts Nos. 1 to 7, from Barth to The New Mexico Lumber Company, and the deed is then set out *in hacc verba.* The last line of this deed is as follows:

"This deed is given as correction for deed made June 1, 1900." (Record, pages 6-7.)

To these indictments respectively each of the defendants demurred on the grounds that no crime or criminal offense was charged and that the indictments showed on their faces, respectively, that prosecution of the defendants on account of the alleged conspiracies was barred by the statute of limitations. (In U. S. vs. Freeman et al. the defense of the statute of limita-

tions was invoked by Welch W Nossaman by his general demurrer to the indictment and also by supplemental demurrer.)

Record, No. 627, pages 13-37.

Record, No. 628, pages 11-27.

Thereafter, and on December 24, 1907, the demurrers of all the defendants were sustained, for the reasons and upon the grounds stated in the opinions filed in said cases, and the said indictments and each of them quashed. (Record, No. 627, pages 38-40; Record, No. 628, pages 29-30.)

The said opinions are made a part of the bill of exceptions in each case (Record, No. 627, pages 42-3; and Record, No. 628, pages 32-43.)

The Timber and Stone Act of June 3, 1878, being Act of Congress through the violation of which the government contends the defendants conspired to obtain, indirectly, for The New Mexico Lumber Company, timber lands which the said company could not obtain directly, is as follows:

"Section 1. (Sale of timber and stone lands.) That surveyed public lands of the United States within the public-land states, not included within military, Indian, or other reservations of the United States, valuable chiefly for timber, but unfit for cultivation, and which have not been offered at public sale according to law, may be sold to citizens of the United States, or persons who have declared their intention to become such, in quantities not exceeding one hundred and sixty acres to any person or association of persons, at the minimum price of two dollars and fifty cents per acre; and lands valuable chiefly for stone may be sold on the same terms as timber lands: *Provided*, That nothing herein contained shall defeat or impair any bona fide claim under any law of the United States, or authorize the sale of any mining claim, or the improvements of any bona fide settler, or lands containing gold, silver, cinnabar, copper or coal, or lands selected by the said states under law of the United States donating lands for internal improvements, education, or other purposes; *And provided further*, That none of the rights conferred by the act approved July twenty-six, eighteen hundred and sixty-six, entitled 'An act granting the right-of-way to ditch and canal owners over the public lands, and for other purposes,' shall be abrogated by this act; and all patents granted shall be subject to any vested and accrued water rights, or rights to

ditches and reservoirs used in connection with such water rights, as may have been acquired under and by the provisions of said act; and such rights shall be expressly reserved in any patent issued under this act.

"Sec. 2. *(Application for purchase*—penalty for false swearing, etc.) That any person desiring to avail himself of the provisions of this act shall file with the register of the proper district *a written statement* in duplicate, one of which is to be transmitted to the general land office, designating by legal subdivisions the particular tract of land he desires to purchase, setting forth that the same is unfit for cultivation, and valuable chiefly for its timber or stone; that it is uninhabited; contains no mining or other improvements, except for ditch or canal purposes, where any such do exist, save such as were made by or belong to the applicant, nor, as deponent verily believes, any valuable deposit of gold, silver, cinnabar, copper or coal; that deponent has made no other *application* under this act; that he does not *apply* to purchase the same on speculation, *but in good faith to appropriate it to his own exclusive use and benefit; and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the government of the United States should inure, in whole or in part, to the benefit of any person except himself;* which statement must be verified by the oath of the *applicant* before the register or the receiver of the land office within the district where the land is situated; and if any person taking such oath shall swear falsely in the premises, he shall be subject to all the pains and penalties of perjury, and shall forfeit the money which he may have paid for said lands, and all right and title to the same; and any grant or conveyance which he may have made, except in the hands of bona fide purchasers, shall be null and void.

"Sec. 3. *(Publication of application*—proof—*entry* and patent—objections.) That upon the filing of said *statement*, as provided in the second section of this act, the register of the land office shall post a notice of such *application*, embracing a description of the land by legal subdivisions, in his office, for a period of sixty days, and shall furnish the *applicant* a copy of the same for publication, at the expense of such *applicant*, in a newspaper published nearest the location of the premises, for a like period of time; and after the expiration of said sixty days, if no adverse claim shall have been filed, *the person desiring to purchase shall furnish to the register of the land office satisfactory evidence, first, that said notice of the application*

prepared by the register as aforesaid was duly published in a newspaper as herein required; secondly, that the land is of the character contemplated in this act, unoccupied and without improvements, other than those excepted, either mining or agricultural, and that it apparently contains no valuable deposit of gold, silver, cinnabar, copper or coal; and upon payment to the proper officer of the purchase money of said land, together with the fees of the register and the receiver, as provided for in case of mining claims, in the twelfth section of the act approved May tenth, eighteen hundred and seventy-two, the *applicant* may be permitted to ENTER said tract, and, on the transmission to the general land office of the papers and testimony in the case, *a patent shall issue thereon: Provided*, That any person having a valid claim to any portion of the land may object, in writing, to the issuance of a patent to lands so held by him, stating the nature of his claim thereto; and evidence shall be taken, and the merits of said objection shall be determined by the officers of the land office, subject to appeal, as in other land cases. Effect shall be given to the foregoing provisions of this act by regulations to be prescribed by the commissioner of the general land office.

"Sec. 4. (Unlawful cutting of timber on public lands—penalty—exceptions.) That after the passage of this act it shall be unlawful to cut, or cause or procure to be cut, or wantonly destroy, any timber growing on any lands of the United States, in said states and territory or remove, or cause to be removed, any timber from said public lands, with intent to export or dispose of the same; and no owner, master, or consignee of any vessel, or owner, director, or agent of any railroad, shall knowingly transport the same, or any lumber manufactured therefrom; and any person violating the provisions of this section shall be guilty of a misdemeanor, and, on conviction, shall be fined for every such offense a sum not less than one hundred nor more than one thousand dollars; *Provided*, That nothing herein contained shall prevent any miner, or agriculturist from clearing his land in the ordinary working of his mining claim, or preparing his farm for tillage, or from taking the timber necessary to support his improvements, or the taking of timber for the use of the United States; and the penalties herein provided shall not take effect until ninety days after the passage of this act.

"Sec. 5. (Relief of person prosecuted for cutting timber—disposal of moneys collected.) That any person prosecuted in said states and territory for violating section two thousand four hundred and sixty-one of the Revised Statutes of the United

States who is not prosecuted for cutting timber for export from the United States, may be relieved from further prosecution and liability therefor upon payment, into the court wherein said action is pending, of the sum of two dollars and fifty cents per acre for all lands on which he shall have cut or caused to be cut timber, or removed or caused to be removed the same; *Provided*, That nothing contained in this section shall be construed as granting to the person hereby relieved the title to said lands for said payment; but he shall have the right to purchase the same upon the same terms and conditions as other persons, as provided hereinbefore in this act: *And further provided*, That all moneys collected under this act shall be covered into the treasury of the United States. And section four thousand seven hundred and fifty-one of the Revised Statutes is hereby repealed, so far as it relates to the states and territory herein named.

"Sec. 6. (Repeal.) That all acts and parts of acts inconsistent with the provisions of this act are hereby repealed."

20 Stat. at L., chapter 151, page 89.

7 Fed. Stats. Ann., pages 300 to 306.

The first paragraph of this section as originally enacted read as follows:

"That surveyed public lands of the United States within the states of California, Oregon and Nevada and in Washington territory, not included within, etc."

By the act of August 4, 1892, the act of June 3, 1878, was amended by striking out the words "States of California, Oregon, Nevada and Washington Territory," so that the act should read as above set forth, the purpose of this amendment being to make the act of June 3, 1878, applicable to all the public land states.

27 Stat. at L., 348.

7 Fed. Stat. Ann., page 301.

II.

LACK OF JURISDICTION IN THE SUPREME COURT.

Writs of error were sued out by the United States from this court to the District Court of Colorado, under the Act of Congress of March 2, 1907.

34 Stat. L., 1246.

Fed. Stats Ann. Supp, 1907, page 193,

which provides that a writ of error may be sued out on behalf of the United States in a criminal case in the following instances:

"From a decision or judgment, quashing, setting aside or sustaining a demurrer to any indictment or any count thereof, where such decision or judgment is *based upon the invalidity or construction of the statute upon which the indictment is founded.*"

"From the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy."

There are other provisions of this statute with which we are not concerned in this discussion.

In Defiance Water Company vs. Defiance, 191 U. S., 184, 194, the court said:

"The fundamental question of jurisdiction, first, of this court, and then of the court from which the record comes, presents itself on every writ of error or appeal, and must be answered by the court, whether propounded by counsel or not."

In Giles vs. Teasley, 193 U. S., 146, 160, it is said:

"In every case which comes to this court on writ of error or appeal the question of jurisdiction must be first answered, whether propounded by the counsel or not."

To the same effect see—

Mansfield, etc., Ry. vs. Swann, 111 U. S., 379, 382;

Morris vs. Gilmer, 129 U. S., 315, 325, 326;

Continental National Bank vs. Buford, 191 U. S., 119, 120;

Empire State Idaho Mining Co. vs. Hanley, 205 U. S., 225, 231.

We submit that for the following reasons this court should now dismiss the writs of error:

1. The decision of Judge Lewis quashing the indictments was not based upon the invalidity of the statute (section 5440) upon which the indictments were founded, nor upon the invalidity of any statute whatever. Upon this proposition there is not even room for argument.

2. That the decision of the court below was not based upon the construction of the statute (section 5440) upon which the indictments were founded.

3. The decision or written opinion of Judge Lewis in the court below (Record, case No. 628, page 32) shows that the court did not sustain a special plea in bar of the defendants in either case No. 627 or No. 628, the bar of the statute of limitations being raised by demurrer and the admission of the necessary facts on the part of the Government.

4. That even if the Government shall contend that the court's opinion—that the cases were barred by the statute based upon the demurrers of the defendants—is of the same effect as though they had raised the question by plea, yet we contend that this would not give the court jurisdiction, for the indictments were held bad and quashed on grounds which allow no writ of error, independent of the statute of limitations, and this being true, nothing which was said or held by the court below as to the statute of limitations was necessary in the decision of the cases. These indictments were held bad first, because they stated no offense. That alone disposed of the cases. The court further said that if the Government contended that only one offense was charged in each indictment, such offense would be barred by the statute of limitations, and if this were not true, then the indictments were bad for duplicity.

The court below in the principal opinion (U. S. vs. Biggs et al., 628, Record, page 35), after stating the facts, says:

"The indictment in its charge does not embody the use of criminal means to accomplish the end. So the inquiry is, Do the facts charged constitute a defrauding of the United States within the meaning of the second clause of section 5440?"

The court in the opinion concludes from an investigation of the authorities referred to therein:

1. "That the agreements between the entrymen and defendants, as charged in the indictment, were neither void nor voidable, but were enforcible contracts between the parties."
2. "That the acts charged are neither prohibited by statute and unlawful, nor mala in se, nor do they involve moral turpitude; hence, whether we consider them either as means to accomplish an end, or as the end to be accomplished, they do not constitute a crime."

"The indictment, therefore, does not charge an offense."

Record, No. 628, page 41.

In this it will be seen that the court did not hold either section 5440—on which the indictments were founded—or the Timber and Stone Act, invalid. No suggestion of the invalidity of either was made to the court below in argument, nor was such holding made by the court in the opinions rendered in these cases.

In Caro vs. Davidson, 197 U. S., 197, 200, on writ of error from the United States Supreme Court to the Supreme Court of Florida, on motion to dismiss for lack of jurisdiction, this court said:

"The contention is that the judgment of the Supreme Court proceeded upon this act, which was invalid, if so applied, because *ex post facto*, and that, therefore, this court has jurisdiction, inasmuch as the validity of the act was thus drawn in question and its validity sustained. Yet no definite issue as to the validity of that statute was distinctly deducible from the record, no decision in favor of its validity appeared therefrom, and the judgment might have rested on grounds not involving its validity."

In Crary vs. Devlin, 154 U. S., 619, this court said:

"The motion to dismiss this cause is granted upon the authority of Miaing Co. vs. Boggs, 3 Wall., 304. There could

have been no decision of the Court of Appeals against the validity of any statute of the United States, because it was found that the facts upon which the defendants below relied to bring their case within the statute in question did not exist. *The judgment did not deny the validity of the statute, but the existence of the facts necessary to bring the case within its operation.*"

In Cameron vs. United States, 146 U. S., 533, 536, in a proceeding brought by the United States to compel the defendant to abate a wire fence, dismissing the writ of error, this court held that:

"Nor can our jurisdiction be sustained under the second section of the act of March 3, 1885, providing that the limit of $5,000 shall not apply to any case 'in which is drawn in question the validity of a * * * statute of or an authority exercised under the United States;' since this refers to an authority exercised or claimed in favor of one of the parties to the cause, the validity of which was put in issue on the trial of the case, and not to the validity of any authority exercised by the United States in removing the fence pursuant to the judgment of the court. If the latter were the true construction, then every case in which the court issued an injunction or an execution might be said to involve the validity of a statute, or an authority exercised, under the United States, since it is by virtue of such authority that the marshal executes the writ. No question is raised here as to the validity of a statute, but merely as to the application of the statute to this case."

In Ferry vs. King County, 141 U. S., 668, 673, Mr. Chief Justice Fuller for this court said:

"We have repeatedly held that the validity of a statute is not drawn in question every time rights claimed under such statute are controverted, nor is the validity of an authority every time an act done by such authority is disputed. Snow vs. United States, 118 U. S., 346, 352; Baltimore & Potomac Railroad vs. Hopkins, 130 U. S., 210; Cook County vs. Calumet & Chicago Canal & Dock Co., 138 U. S., 625.

"The validity neither of statute nor authority was primarily denied here and the denial made the subject of direct inquiry, nor was there any decision whatever against the validity of statute or authority."

Many other cases to the same effect might be cited, but it would hardly seem necessary in view of the fact that it is so clearly obvious that the court below did not base its decision upon the invalidity of either of the statutes mentioned.

As to our second proposition, it will be found upon an examination of the opinion in these cases that the court did not base its decision upon the construction of section 5440, upon which the indictments were founded. The statute requires no construction and was given none. The court construed the indictments, not the statute. The meaning of the statute was and is conceded by all. The court held that the indictments did not charge an offense. If the court's rulings quashing these indictments can be reviewed, then there is no case where an indictment is quashed that is not subject to be brought to this court by writ of error. It is clear from the statute that Congress did not intend to permit a review of every order of a court quashing an indictment. Where the decision quashing the indictment is based simply on defects in pleading, there can be no review. These indictments were attacked on several grounds. Judge Lewis said that they charged no offense and that if they did they would seem to be bad for duplicity. In this there is no construction of section 5440, or in fact of any other statute. The statute allowing a writ of error was never passed with the expectation or intention that this court should be called upon to pass upon all the bad, criminal pleadings drawn by all of the Government attorneys in the United States. It was undoubtedly passed to reach two classes of cases:

1. Where a trial judge declares invalid a solemn act of Congress and quashes an indictment for such reason. In such a case it was provided that the Government should have the right to present the question of the nullification of the legislative act to the highest court in the land.

2. When the true meaning or construction of a criminal statute is questioned and the dispute concerning the same is determined by the judgment of the court below. As to such a dispute, conflicting decisions are apt to be, and, in fact, are rendered by the trial courts. So it was deemed proper that the Government, upon one of its indictments being quashed by

reason of the construction of the statute upon which it was founded, should have the right to take the case to this court, the final arbiter as to all such questions for determination.

In both of these classes of cases, prior to the passage of the Act of 1907, the Government had no such remedy, and it was to afford one that the 1907 statute was enacted.

Since it may possibly be urged that the lower court construed the Timber and Stone Act, it may now be well to consider such contention, although we are convinced that an examination of the timber and stone act and the opinion of the court below will demonstrate the fact that the judgment of the court below was not in any way based upon a *construction* of that act.

Congress, in enacting the law of March 2, 1907, above referred to, used the word "construction" in its ordinary meaning, and when it said "construction" it did not mean "interpretation."

The courts have long distinguished between "interpretation" and "construction."

It is said in Bloomer vs. Todd, 3 Wash. Ter., 612 (s. c., 19 Pac. Rep., 135, 138):

"Interpretation differs from construction in this: That it is used for the purpose of ascertaining the true sense of any form of words, while construction involves the drawing of conclusions regarding subjects that are not always included in the direct expression."

In Proprietors of Morris Aqueduct vs. Jones, 36 N. J. Law, 206, the court quotes from the definition of Dr. Lieber in his Hermeneutics, where it is said that "interpretation is the mere finding of the true sense of the special form of words used"; that "construction is the drawing of conclusions respecting subjects that lie beyond the direct expression of the text—conclusions which are in the spirit though not within the letter of the text."

The Supreme Court of Nebraska in State ex rel. Hastings, Attorney General vs. Smith, 35 Nebraska, 13, 22, adopts the same rule.

The Court of Appeals of New York in People ex rel. Twenty-third Street R. R. Co. vs. Commissioner of Taxes of the

City of New York, 95 N. Y., 554-559, also adopts the distinction made by Dr. Lieber between "interpretation" and "construction" of a statute. Construction is entirely different from interpretation.

In Deane vs. State, 159 Indiana, 313, the Supreme Court of Indiana had occasion to pass upon the question of whether, under the statutes of that state, providing for a direct appeal to the Supreme Court in all cases where there had been a construction of a statute by the trial court, the trial court had construed a statute or had merely passed upon the sufficiency of the indictment as measured by the statute. At page 316 the court said:

"Appellant's contention under the circumstances certainly can not be said to present any question for the proper construction of the statute, within the meaning of the exception as declared in section 8, supra, but, rather, raises one which wholly relates to the construction of the pleadings. * * * Certainly the phrase, 'the proper construction of the statute,' can not be said to apply to or include a statute which is so plain in its terms and provisions as to leave no room for judicial construction, otherwise, the prohibition of section 7 denying an appeal could be easily evaded upon the mere assertion of the appellant that the point involved in the case depended upon the construction of the statute. Where the act is, under its terms and provisions, plain and unambiguous, and admits of but one meaning, it can not be said to be open to a construction within the meaning of the exception in section 8. Under such circumstances the law, if valid, must be taken and enforced as written, for it is not permissible to interpret or construe that which has no need of construction. The province of construction, as the authorities assert, lies wholly within the domain of ambiguity. Endlich on Interpretation of Stats., section 4; Sedgwick on Statutory Const. (2 Ed.), 195; 23 A. & E. Ency. of Law, 298, and authorities cited in foot note 2. State vs. Sopher, 157 Ind., 360."

In Terre Haute, etc., R. R. Co. vs. Erdel, 158 Ind., 344, 347, the court said:

"Construction can only be employed for the discovery of the true intent and meaning of an instrument, and when the language is plain there can be no construction, because there is

nothing to construe. It is preposterous to say that the lawmakers intended to authorize the bringing of a statute to this court by special proceeding, for construction or interpretation, when there existed no ground for dispute as to its intent and meaning."

"The statute itself furnishes the best means of its own exposition; and if the sense in which words were intended to be used can be clearly ascertained from its parts and provisions, the intention thus indicated will prevail without resorting to other means of aiding in the construction. Very strong expressions have been used by the courts to emphasize the principle that they are to derive their knowledge of the legislative intention from the words or language of the statute itself which the legislature has used to express it, if a knowledge of it can be so derived."

Lewis' Sutherland Statutory Construction, Sec. 366.

"It is beyond question the duty of courts in construing statutes to give effect to the intention of the law making power, and seek for that intent in every legitimate way. But * * * first of all in the words and language employed; and if the words are free from ambiguity and doubt, and express plainly, clearly and distinctly the sense of the framers of the instrument, there is no occasion to resort to other means of interpretation."

McCluskey vs. Cromwell, 11 N. Y., 593, 601.

"When the intention of the legislature is so apparent from the face of a statute that there can be no question as to the meaning, there is no room for construction."

People vs .Sands, 102 Cal., 12, 16; 36 Pac., 404.

"It is not allowable to interpret what has no need of interpretation."

Gilbert vs. Dutruit ,91 Wis., 661, 665; 65 N. W., 511.

"There is no safer or better settled canon of interpretation than that when language is clear and unambiguous it must be held to mean what it plainly expresses, and no room is left for construction."

Swarts vs. Siegel, 117 Fed., 13; 54 C. C. A., 399, 405.

"It is an elementary proposition that courts only determine by construction the scope and intent of a law when the

law itself is ambiguous or doubtful. If a law is plain, and within the legislative power, it declares itself, and nothing is left for interpretation. It is as binding upon the court as upon every citizen. To allow a court, in such a case, to say that the law must mean something different from the common import of its language, because the court may think that its penalties are unwise or harsh, would make the judicial superior to the legislative branch of the government, and practically invest it with the law-making power. The remedy for a harsh law is not in interpretation, but in amendment or repeal."

State vs. Duggan, 15 R. I., 403; 6 Atl., 787.

In United States vs. Hartwell, 6 Wallace, 385, 396, the court says:

"The object in construing penal, as well as other statutes, is to ascertain the legislative intent. That constitutes the law. If the language be clear it is conclusive. There can be no construction where there is nothing to construe."

In Lake County vs. Rollins, 130 U. S., 662, 670-71, the court says:

"So, also, where a law is expressed in plain and unambiguous terms, whether those terms are general or limited, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction."

In Yerkes vs. United States, 173 U. S., 439, 442, the court said:

"The rule is elemental that language which is clear needs no construction."

In Hamilton vs. Rathbone, 175 U. S., 414, 421, the court says:

"Indeed, the cases are so numerous in this court to the effect that the province of construction lies wholly within the domain of ambiguity, that an extended review of them is quite unnecessary."

In Weber vs. St. Paul City Railway Co., 38 C. C. A., 79, 83-84, the court says:

"When the language of a statute is unambiguous and its meaning is clear, arguments by analogy or from history and attempted judicial construction serve only to create doubt and to confuse the judgment. They serve to obscure far more than to elucidate the meaning of the law. There is no safer or better canon of interpretation than that, when the terms of a statute are plain and its meaning is clear, the legislature must be presumed to have meant what it expressed, and there is no room for construction. Knox County vs. Morton, 32 U. S. App., 513, 516; 15 C. C. A., 671, 673, and 68 Fed., 787, 789. U. S. vs. Fisher, 2 Cranch, 358, 399. Railway Co. vs. Phelps, 137 U. S., 528, 536; 11 Sup. Ct., 168. Bedsworth vs. Bowman, 104 Mo., 44, 49; 15 S. W., 990. Warren vs. Paving Co., 115 Mo., 572, 576; 22 S. W., 490. Davenport vs. City of Hannibal, 120 Mo., 150; 25 S. W., 364."

In Johnson vs. Southern Pacific Co., 54 C. C. A., 508, 511, the court says:

"Construction and interpretation have no place or office where the terms of a statute are clear and certain, and its meaning is plain. In such a case they serve only to create doubt and to confuse the judgment. When the language of a statute is unambiguous, and its meaning evident, it must be held to mean what it plainly expresses, and no room is left for construction."

In United States vs. Fisher, 2 Cranch, 358, 399, this court said:

"Where a law is plain and unambiguous, whether it be expressed in general or limited terms, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction."

Chief Justice Marshall said in U. S. vs. Wiltberger, 5 Wheat., 76, 96:

"The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one indeed which would justify a court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute, its language must authorize us to say so."

In the light of these decisions, it will be seen that in the cases at bar the District Court simply held that the facts set forth in the indictments did not constitute a violation of the land laws referred to. The court says (157 Fed. 270, Record, No. 628, pages 39-41):

"The facts charged against the defendants are not prohibited in the timber and stone act, and we can not by construction read into that act a prohibition against them, and in such manner by construction hold the acts charged to be in violation of said statute, and therefore illegal and unlawful, for the purpose of constituting the fraud denounced by section 5440."

The court cites in this connection:

U. S. vs. Clayton, 2 Dill., 219; Fed. Cas., No. 14814;
U. S. vs. Wiltberger, 5 Wheat., 76, 95, 96;
Smith vs. Townsend, 148 U. S., 490, 497;
France vs. U. S., 164 U. S., 676;
Francis vs. U. S., 188 U. S., 375;
U. S. vs. Benecke, 98 U. S., 447;
Taylor vs. U. S., 207 U. S., 120;
Todd vs. U. S., 158 U. S., 278,

and adds:

"From these authorities I understand the settled rule to be that when it is sought to charge that designated acts constitute a crime under a statute it is not sufficient that such acts be violative of the spirit and policy of the statute or of the words of the statute, but that they must be violative both of the words and of the spirit and policy of the statute; that is, the acts must follow both within the reasonable meaning of its terms and also within the spirit and scope of the enactment, or otherwise, stated, the acts charged must come not only within the mischief but fairly within the words. In the light of this time-honored, unbroken and invariable rule, sustained constantly by all authorities, both ancient and modern, it seems idle to talk about following out construction placed on the timber and stone act in civil proceedings before the land department, as shown in the land office decisions."

In this connection it might be added that the ruling of this case is precisely in line with the ruling of this honorable

court in the case of Williamson vs. U. S., 207 U. S., 425, 458, et post.

It thus appearing that no "construction" of any statute was involved in the judgments in these cases, and particularly that section 5440 was neither construed nor interpreted, it would seem clear that this court has no jurisdiction to review the judgment by writ of error.

As to our third proposition, that the court below did not sustain any special plea in bar, we deem it unnecessary to say much of anything in addition to the proposition as laid down, for it will be found upon an examination of the record in these cases that none of the defendants filed any plea in bar raising the statute of limitations. As to all of the defendants, the question was raised by demurrer, the necessary facts being admitted by the Government.

We believe that a reading of the opinion of Judge Lewis will show that he did not, in fact, sustain a "plea in bar" in these cases. The facts as shown by the record are that the court in its opinion held that the indictments stated no offense, and that, if they did state an offense, they were bad for duplicity. The position taken by the court made it unnecessary in order to dispose of the cases to pass on the statute of limitations, and we content that, having once held the indictments bad because they stated no offense, or for duplicity, anything said in reference to the statute of limitations was an expression of the court's views, which, while correct, were not required for the disposition of the cases, since the indictments were held bad, for the reasons above pointed out. When the indictment was quashed, there was an end of it, and nothing which the court further said could furnish a ground upon which to sustain a writ of error.

In considering the fourth proposition, supra, it may be said that, even if we were to concede, for the sake of argument only, that the sustaining of the demurrers, whereby the question of the statute of limitations was raised by the defendants, was equivalent to the sustaining of a plea in bar, yet this court would not, because of that fact, have jurisdiction of these writs.

The written opinion of the lower court in U. S. vs. Biggs et al. is, after a statement of the facts, in three divisions. First,

the court concludes that "the indictment, therefore, does not charge an offense"; second, that the indictment is bad for duplicity; and, third, if the indictment does not charge several conspiracies, but only one, that as to that conspiracy the statute of limitations has run and barred prosecution thereof; and, fourth, that the uncertainty as to whether the indictment charged several or but one conspiracy rendered the indictment bad, for the court said "if we take the first view the charge is duplcitous, and, if the second prosecution of the offense is barred. *The dilemma renders the indictment bad.*"

In U. S. vs. Freeman et al. the opinion rendered adopts the reasoning contained in the opinion in U. S. vs. Biggs, and therefrom concludes that the indictment is likewise bad. (Record, No. 627, page 43.)

The judgments entered were:

"that for the reasons and upon the grounds stated in the opinions filed in this cause, on the twenty-fourth day of December last, *the demurrers of the defendants*, including the defenses therein set up, based upon the statute of limitations (the legal sufficiency of which defenses in substance admitting the matters of fact therein alleged was drawn in question by the plaintiff at the argument), be, and they are hereby, sustained."

(Record, No. 628, page 30; Record, No. 627, pages 39-40.)

It appears, therefore, that, while the court expressed itself as of the opinion that *if* "the indictment does not charge several conspiracies, as above indicated, but that it was one conspiracy continuous from its formation on August 25, 1899, to the presenting of the indictment," prosecution of the offense is barred (Record, No. 628, page 43), yet, the court did not expressly declare that the indictments charged but one conspiracy. What the court did hold was that "the dilemma" as to whether the indictments charged several conspiracies or but one conspiracy "rendered the indictment bad."

In any view which may be taken of the opinions rendered and the judgments based thereon entered, it is clear that the court's determination upon the statute of limitations was not

the sole and decisive ground whereon it determined that the indictments should be quashed. In other words, the expression of opinion with reference to the statute of limitations in view of the earlier determination therein contained was not necessary to a decision of the cases. The controlling and an independent ground for the court's conclusion was the failure of the indictments to charge a criminal offense. This ground is and was broad enough to sustain the court's judgments without the decision upon the question of the statute of limitations. The result is that this court has no jurisdiction by reason of the "sustaining of a special plea in bar." The decisions of this court are determinative of this question.

In Klinger vs. State, 13 Wall., 257, 263, this court laid down the rule of jurisdiction here contended as applicable:

"Where it appears by the record that the judgment of the state court might have been based either upon a law which would raise a question of repugnancy to the Constitution, laws or treaties of the United States, or upon some other independent ground, and it appears that the court did, in fact, base its judgment on such independent ground, and not on the law raising the federal question, this court will not take jurisdiction of the case, even though it might think the position of the state court an unsound one. But where it does not appear on which of the two grounds the judgment was based, then, if the independent ground on which it might have been based was a good and valid one, sufficient of itself to sustain the judgment, this court will not assume jurisdiction of the case."

In Cook County vs. Canal Co., 138 U. S., 635, 651, the court said:

"The rule is settled that to give this court jurisdiction of a writ of error to a state court it must appear affirmatively, not only that a federal question was presented for decision by the highest court of the state having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it."

In Eustis vs. Bolles, 150 U. S., 361, 366, Mr. Justice Shiras, delivering the opinion of the court, said:

"It is settled law that, to give this court jurisdiction of a writ of error to a state court, it must appear affirmatively, not only that a federal question was presented for decision by the state court, but that its decision was necessary to the determination of the cause, and that it was actually decided adversely to the party claiming a right under the federal laws or Constitution, or that the judgment as rendered could not have been given without deciding it. Murdock vs. Memphis, 20 Wall., 590; Cook County vs. Calumet & Chicago Canal Co., 138 U. S., 635.

"It is likewise settled law that, where the record discloses that if a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, another question, not federal, has been also raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the federal question, to sustain the judgment, this court will not review the judgment."

In California Powder Works vs. Davis, 151 U. S., 389, 393, it is said:

"It is axiomatic that, in order to give this court jurisdiction on writ of error to the highest court of a state in which a decision in the suit could be had, it must appear affirmatively not only that a federal question was presented for decision by the highest court of the state having jurisdiction, but that its decision was necessary to the determination of the case, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it. And where the decision complained of rests on an independent ground, not involving a federal question and broad enough to maintain the judgment, the writ of error will be dismissed by this court without considering any federal question that may also have been presented."

In Arkansas R. R. Co. vs. German Nat. Bank, 28 Sup. Ct. Rep., 78, 79, the court said:

"But, according to the well-settled doctrine of this court with regard to cases coming from state courts, unless a decision upon a federal question was necessary to the judgment, or in fact was made the ground of it, the writ of error must be dismissed. And even when an erroneous decision upon a fed-

eral question is made a ground, if the judgment also is supported upon another which is adequate by itself, and which contains no federal question, the same result must follow, as a general rule. Moreover, ordinarily, this court will not inquire whether the decision upon the matter not subject to its revision was right or wrong."

See, also,

Bushnell vs. Crooks Mining Co., 148 U. S., 682, 690.

Roby vs. Colehour, 146 U. S., 153, 159.

Harrison vs. Morton, 171 U. S., 38, 47.

Mo. Pac. Ry. Co. vs. Fitzgerald, 160 U. S., 556, 576.

Giles vs. Teasley, 193 U. S., 146, 160.

New Orleans Water Works Co. vs. Louisiana, 185 U. S., 336, 344-6.

Leathe vs. Thomas, 207 U. S., 93, 98-99.

Substitute the words "a special plea in bar" in place of the words "federal question" in each of the foregoing cases and their authority becomes directly in point and controlling.

For these reasons, supported by the foregoing authorities, which we contend are determinative of this question, this honorable court is without jurisdiction of the writs of error in the cases at bar under the provisions of the act of March 2, 1907, and accordingly the writs should be dismissed.

The only thing in the whole record which even hints at the "sustaining" of anything called a "plea" is found on page 39 of record in case No. 627, where it is adjudged that Welch W. Nossaman's "plea of the statute of limitations (the legal sufficiency, but not the allegations of facts of which plea was questioned by the plaintiff upon the argument)" is "sustained."

This amended judgment was an afterthought, apparently made to give the counsel for the government an opportunity to present every possible question to this court, and we submit that:

The document filed by defendant Nossaman, which appears in full on pages 35-7 of the record, though *called* a "plea," was

not a "special plea in bar," but was merely a supplemental demurrer.

And hence, that the "sustaining" of the "legal sufficiency" of that paper was *not* "sustaining a special plea in bar."

That naming a demurrer a "plea" does not make it such, would seem to require no argument, but for the recognition of that misnomer in the amended judgment and but for the further fact that all of the demurrers filed in these cases by all of the defendants contained affirmative allegations that the defendants respectively were not and had not been fugitives from justice, and, to that extent, were pleadings of fact. But an examination of all of the demurrers filed in these cases will show that Nossaman merely set up in two documents, simultaneously filed, identically the same matter which the other defendants embodied in a single document, with trifling and immaterial changes in verbiage. Certainly no one could urge that the statement in the 3d paragraph of this supposed "plea:"

"That the said prosecution against the said defendant and said alleged offense is barred by the statute of limitations of three years in such cases made and provided" is a pleading of fact. It is clearly a conclusion of law, urged as a reason why the indictment is bad in law so that the defendant should be discharged "for want of sufficient indictment in this behalf." (Record, page 37.)

As already noted, all of the demurrers, as far as they related to the statute of limitations, set up, and government counsel formally admitted, facts showing that section 1045 of Revised Statutes did not apply. This was done because both parties desired to test the point without the expense of a trial by jury, and the allegations and admissions amounted, for the purposes of the demurrers, to an amendment of the indictments whereby the question could be determined at once. So these allegations of fact do not make Nossaman's demurrer a "special plea in bar" any more than it did the same in case of the other demurrers. The adjudication of legal sufficiency of the paper, therefore, at most, amounts to a judgment that Nossaman did not lose the benefit of the point because he presented it in a separate document, instead of having it in the same paper with

his other grounds of demurrer. His separate presentation of that point is adjudged to be legally sufficient.

That the opinions and judgments all treated this document as a demurrer has already been shown, but the same further appears in the amended judgment which says that its "legal sufficiency was attacked," not by any demurrer or other known form of pleading whereby the sufficiency of a "special plea in bar" may properly be presented for the judgment of a court, but only "in argument," which is the appropriate way to test the "legal sufficiency" of a demurrer.

Under all known systems of pleading the filing of a pleading of fact waives a demurrer, and the judgment of the District Court expressly sustaining Nossaman's demurrer as well as his so-called plea shows that the court regarded both papers as presenting questions of law and that the "plea" was not a "special plea in bar" which would waive a demurrer.

We, therefore, conclude:

That no "special plea in bar" appears in this record.

That no judgment sustaining a "special plea in bar" appears in this record.

That the jurisdiction of this court in regard to these writs of error cannot possibly be based on the clause of the statute of 1907 relating to judgments sustaining such pleas.

And that said jurisdiction cannot be based on the other clause of said statute relating to judgments wherein the invalidity or construction of the statute on which the indictment is based is adjudicated.

This court having heretofore, in Williamson vs. U. S., cited supra, held that the facts relied upon in this case did not constitute a crime under the Timber and Stone Act, it follows that the matter is no longer open to inquiry, and that these cases may not be brought into this court for determination.

Swope vs. Leffingwell, 105 U. S., 3, 4.

Leonard vs. Railroad Co., 198 U. S., 416, 422.

Equitable Society vs. Brown, 187 U. S., 308, 311.

III.

DEFINITION OF CONSPIRACY.

That Lord Denman's antithesis that a criminal conspiracy consisting in the combination for accomplishing an unlawful end or lawful end by unlawful means (Jones case, 1832, 4 B. & Ad., 345) was not intended by him as a definition of what combinations are criminal, is shown by his language in Peck's case, 1839, 9 A. & E., 686, where he said:

"I do not think the antithesis very correct."

And it, while misleading, may only be justified by using the words unlawful and unlawfully as synonyms for criminal and criminally.

In Mulcahy vs. Reg. (1868) L. R., 3 H. L., at page 317, Wiles, J., delivering the opinion of the judges in the House of Lords, declared and defined in what instances a conspiracy is punishable as a crime. He said:

"A conspiracy consists not merely in the intention of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such design rests in intention only, it is not indictable. When two agree to carry into effect the very plot is an act in itself * * * punishable, if for a criminal object or for the use of criminal means."

This definition was approved in the House of Lords in Quinn vs. Leathem, 1901, appeal cases, at page 529.

In 3 Greenleaf on Evidence, section 90a, the word conspiracy is defined as follows:

"A general rule may be deduced from the current of well-considered cases, that an indictable conspiracy must be a corrupt confederation to promote an evil in some degree *criminal*, or to effect some wrongful end by means having some degree of *criminality*. Although, in some cases, it has been said that, if the end is *unlawful*, concerted action to promote it is indictable, yet the word 'unlawful' is to be taken in the sense of *criminal*, as it is unlawful to commit a trespass; still no indictment will lie for a conspiracy to commit such a civil injury. Indeed, unless some element of a criminal nature enters into either the means to be used or the purpose to be effected,

no indictment will lie for a conspiracy to do a private injury when a civil action will afford redress. As examples of the means, a concert by *numbers* to destroy a man's reputation, or by false accusation to cause one wrongfully to pay money; or, as to the end to take away a female for the purposes of prostitution, this being an offense punishable in the ecclesiastical courts; or, to do something which may affect the public mediately or immediately. There is, however, a disposition in the courts not to extend the law of conspiracy beyond its present limits, and to confine it, as is believed, within the definition above given."

In Wright's Law of Criminal Conspiracies and Agreements, section 14, page 48, the author says:

"It is conceived that, on a review of all the decisions, there is a great preponderance of authority in favor of the proposition that, as a rule, an agreement or combination is not criminal unless it be for acts or omissions (whether as ends or means) which would be *criminal* apart from agreement."

It is, we suggest, with this distinction in mind, that Mr. Chief Justice Fuller's definition of a criminal conspiracy under section 5440 of the Revised Statutes, in Pettibone vs. United States, 148 U. S., 197, 203, must be read, where it is said:

"The courts of the United States have no jurisdiction over offenses not made punishable by the Constitution, laws or treaties of the United States, but *they resort to the common law for the definition of terms by which offenses are designated.* A conspiracy is sufficiently described as a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means."

This definition has further been recognized by the Supreme Court, in United States vs. Cruikshank, 92 U. S., 542, 558:

"So, too, it is in some states a crime for two or more persons to conspire to cheat and defraud another out of his property; but it has been held that an indictment for such an offense must contain allegations setting forth the means proposed to be used to accomplish the purpose. This, because,

to make such a purpose criminal, the conspiracy must be to cheat and defraud in a mode made criminal by statute; and, as all cheating and defrauding has not been made criminal, it is necessary for the indictment to state the means proposed, in order that the court may see that they are in fact illegal."

Here the word illegal is used in the sense of criminal.

IV.

GENERAL PRINCIPLES AS TO WHAT AN INDICTMENT MUST CONTAIN.

The sixth amendment to the Constitution of the United States secures to the defendants, among other things, the right "to be informed of the nature and cause of the accusation."

U. S. vs. Miller, 7 Pet. (32 U. S.), 142.
U. S. vs. Cruikshank, 92 U. S., 542, 558.
Evans vs. U. S., 153 U. S., 584; 14 S. C. R., 934.

All the essential elements of fact required to be set forth in an indictment must be there charged in direct, positive and explicit language. Any omission in that behalf cannot be aided by implication, inference, argument, recital or intendment. This principle has been well stated in

U. S. vs. Post, 113 Fed., 854.
Pettibone vs. U. S., 148 U. S., 197.
U. S. vs. Hess, 124 U. S., 486.
U. S. vs. Staats, 49 U. S. (8 How.), 41, 44.
In re Wolf, 27 Fed., 606, 611.
In re Corning, 51 Fed., 205, 210.

"In an indictment nothing material shall be taken by intendment or implication."

Salla vs. United States (C. C. A., 9th Cir.), 104 Fed., 544, 547.

In Miller vs. United States, 133 Fed., 337, the Circuit Court of Appeals for the 8th circuit, where the defendants were charged under section 5440 with conspiring to commit an offense against the United States, said:

"The contention upon which counsel for the defendants seem to rely most confidently is that the indictment does not disclose the scheme or artifice to defraud with the necessary clearness and certainty. Every man is presumed to be innocent until his guilt is established. When one is indicted for a serious offense, the presumption is that he is not guilty, and that he is ignorant of the supposed facts upon which the charge against him is founded. He is unable to secure and present the evidence in his defense—indeed, he is deprived of all reasonable opportunity to defend—unless the indictment clearly discloses the facts upon which the charge of the commission of the offense is based. It must set forth the facts which the pleader claims constitute the alleged transgression so distinctly as to advise the accused of the charge which he has to meet, so fully as to give him a fair opportunity to prepare his defense, so particularly as to enable him to avail himself of a conviction or acquittal in defense of another prosecution for the same crime, and so clearly that the court, upon an examination of the indictment, may be able to determine whether or not, under the law, the facts there stated are sufficient to support a conviction. United States vs. Hess, 124 U. S., 483, 486, 487; 8 Sup. Ct., 571; 31 L. Ed., 516. United States vs. Post (D. C.), 113 Fed., 852.

"The use of the postoffice establishment of the United States to execute a scheme or artifice to defraud, the intention to use it in this way as a part of the scheme or artifice, the scheme or artifice to defraud itself, and the intention of the defendants to defraud, are essential elements of the offense described in section 5480 of the Revised Statutes; and allegations of facts which fairly show the existence of all these essentials, together with an allegation of a conspiracy to commit the offense, are indispensable to a valid indictment under section 5440."

In U. S. vs. Cruikshank, 92 U. S., 542, 557-559, the Supreme Court said:

"In criminal cases prosecuted under the laws of the United States the accused has the constitutional right 'to be informed of the nature and cause of the accusation.' Amend. VI. In *United States vs. Mills*, 7 Pet., 142, this was construed to

mean that the indictment must set forth the offense 'with clearness and all necessary certainty to apprise the accused of the crime with which he stands charged;' and in *United States vs. Cook*, 17 Wall., 174, that 'every ingredient of which the offense is composed must be accurately and clearly alleged.' It is an elementary principle of criminal pleading, that, where the definition of an offense, whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition, but it must state the species—it must descend to particulars.' 1 Arch., Cr. Pr. and Pl., 291. The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent, and these must be set forth in the indictment, with reasonable particularity of time, place and circumstances.

"It is a crime to steal goods and chattels, but an indictment would be bad that did not specify, with some degree of certainty, the articles stolen. This because the accused must be advised of the essential particulars of the charge against him, and the court must be able to decide whether the property taken was such as was the subject of larceny. So, too, it is in some states a crime for two or more persons to conspire to cheat and defraud another out of his property; but it has been held that an indictment for such an offense must contain allegations setting forth the means proposed to be used to accomplish the purpose. This because, to make such a purpose criminal, the conspiracy must be to cheat and defraud in a mode made criminal by statute; and, as all cheating and defrauding has not been made criminal, it is necessary for the indictment to state the means proposed, in order that the court may see that they are in fact illegal. *State* vs. *Parker*, 43 N. H., 83; *State* vs. *Keach*, 40 Vt., 118; *Alderman* vs. *The People*, 4 Mich., 414; *State* vs. *Roberts*, 34 Me., 32. In Maine it is an offense for two or more to conspire with the intent unlawfully and wickedly to commit any crime punishable by imprisonment in the state prison *(State* vs. *Roberts)*; but we think it will hardly be claimed that an indictment would be good under this statute which charges the object of the conspiracy to have been 'unlawfully and wickedly to commit each, every, all and singular, the crimes pun-

ishable by imprisonment in the state prison.' All crimes are not so punishable. Whether a particular crime be such a one or not is a question of law. The accused has, therefore, the right to have a specification of the charge against him in this respect, in order that he may decide whether he should present his defense by motion to quash, demurrer or plea; and the court, that it may determine whether the facts will sustain the indictment. So here the crime is made to consist in the unlawful combination with an intent to prevent the enjoyment of any right granted or secured by the Constitution, etc. All rights are not so granted or secured. Whether one is so or not is a question of law, to be decided by the court, not the prosecutor. Therefore the indictment should state the particulars, to inform the court as well as the accused. It must be made to appear—that is to say, appear from the indictment, without going further—that the acts charged will, if proved, support a conviction for the offense alleged."

In United States vs. Hess, 124 U. S., 483, under section 5480, the defendant was indicted for the alleged offense of devising "a scheme to defraud divers other persons," through the post office establishment. On page 486, the court says:

"The statute is directed against 'devising or intending to devise any scheme or artifice to defraud,' to be effected by communication through the postoffice. As a foundation for the charge, a scheme or artifice to defraud must be stated, which the accused either devised or intended to devise, with all such particulars as are essential to constitute the scheme or artifice, and to acquaint him with what he must meet on the trial."

In United States vs. Walsh, 5 Dill., 58, 63; 28 Fed. Cases, Case No. 16,636, page 396, Dillon, J., says:

"The conspiracy to defraud the United States is alleged to consist in 'certifying that certain false and fraudulent accounts and vouchers for material furnished for use in the construction of the said custom house and postoffice, and for labor performed on said buildings were true and correct.' What can be more general and indefinite than this? It is not alleged that the conspiracy was to certify falsely all accounts and vouchers for material and labor for the building, but to certify 'that certain false accounts and vouchers for material and labor were true and correct.' This is all. But what accounts and what vouchers is not alleged. How does this advise the defendant so as to enable him to make his defense? What accounts or what vouch-

ers are to be impeached? How can the court know, if a trial is gone into under this indictment, whether the accounts and vouchers offered in evidence by the government are the same ones in respect to which the grand jury found the bill of indictment? Lambert vs. People, 9 Cow., 578. If the defendants are convicted or acquitted on an indictment so general and uncertain, how can they plead the judgment in bar of another prosecution? How does it appear that the accounts and vouchers were such as that an intent to defraud the United States can be predicated of them? No dates, sums, amounts, persons or materials are mentioned, and it does not appear that this could not be done, for the allegation is that the conspiracy related to 'certain false and fraudulent accounts.' We agree with the Supreme Court of Pennsylvania, in the case cited, that 'precision in the description of the offense is of the last importance to the innocent,' and hence the importance of the decision of the United States Supreme Court in the Cruikshank case, which settles the law for all the courts of the United States."

In United States vs. Staats, 49 U. S. (8 How.), 41, 44, it is said:

"The general rule is that the charge must be laid in the indictment, so as to bring the case within the description of the offense as given in the statute, alleging distinctly all the essential requisites that constitute it.

"Nothing is to be left to implication or intendment. Generally speaking, it is sufficient to pursue the words of the act; but if, in pursuing them, there should be any ambiguity or uncertainty in charging the offense, the pleader should regard the substance and legal effect of the enactment. And when words or terms of art are used in the description, that have a technical meaning at common law, these should be followed, being the only terms to express in apt and legal language the nature and character of the crime."

In United States vs. Martin, 26 Fed. Cases, Case No. 15,728, page 1178, the court said:

"Indictable offenses, whether created by statute or recognized as arising at common law, usually contain more than one element or ingredient, and the rule is universal that unless every material ingredient of the charge is set forth in the indictment, the defect may be reached by demurrer, or the judgment may be arrested."

In Pettibone vs. United States, 148 U. S., 197, 202, the defendants were charged with a criminal conspiracy under section 5440, and the court said:

"The confederacy to commit the offense is the gist of the criminality under this section, although to complete it some act to effect the object of the conspiracy is needed. *United States vs. Hirsch*, 100 U. S., 33.

"This is a conviction for conspiracy, corruptly and by threats and force to obstruct the due administration of justice in the Circuit Court of the United States for the district of Idaho, and the combination of minds for the unlawful purpose and the overt act in effectuation of that purpose must appear charged in the indictment.

"The general rule in reference to an indictment is that all the material facts and circumstances embraced in the definition of the offense must be stated, and that, if any essential element of the crime is omitted, such omission can not be supplied by intendment or implication. The charge must be made directly and not inferentially or by way of recital."

In In re Wolf, 27 Fed., 606, 611, the court says:

"It is manifest that to constitute a criminal offense under this section the object of the conspiracy must be to commit some offense against the United States; that is, to do some act made a crime by the laws of the United States, or to defraud the United States; and that something must be done by one or more of the conspirators to effect the object of the conspiracy. The definition of this offense would be 'an agreement between two or more persons to do some act which, by the laws of the United States, is a crime, and the doing of some act, by one or more of those who had so agreed, in furtherance of or to effect the object of the agreement.' To constitute a good indictment under this section, it must charge that the conspiracy was to do some act made a crime by the laws of the United States, and it must state with such reasonable certainty the acts intended to be effected or carried out by the agreement of the parties, so that it can be seen the object of the conspiracy was a crime against the United States. The conspiracy or agreement, and the doing of some act in furtherance of it, make up the offense. The object of it, however, is a requisite of the indictment."

In United States vs. Crafton, 25 Fed. Case No. 14,881, page 682, Dillon, J., says: "Under the recognized rules of

criminal pleading, it is not sufficient to allege generally a conspiracy to defraud; but the nature of the fraud, and, to the required extent, the manner in which, or the means by which it was to be effected, must be averred."

In United States vs. Watson, 17 Fed., 145, under section 5440, the defendants were charged with conspiring to commit a crime against the United States. The court, in considering the sufficiency of the indictment under this section, says:

"To constitute a good information or indictment under this section, it must charge that the conspiracy was to do some act made a crime by the laws of the United States, and must state with sufficient certainty the acts intended to be effected or carried out by the conspiracy or agreement of the parties; in other words, must sufficiently state the offense intended to be committed, and must then state some act done by one of the conspirators towards effecting the object of the conspiracy."

In Dealy vs. United States, 152 U. S., 539, the indictment expressly charges that the entries were to be homestead entries, and that the United States was to be defrauded by reason of these homestead entries.

In United States vs. Taffe, 86 Fed., 113, 115, the court said:

"To constitute a good indictment under section 5440, Rev. St., it must charge that the conspiracy was to do some act made a crime by the laws of the United States; and it must state with reasonable certainty the acts intended to be effected or carried out by the agreement of the parties, so that it can be seen that the object of the conspiracy was a crime against the United States. In re Wolf, 27 Fed., 611. In this case the first count contains no averment of facts constituting the offense which the conspiracy was formed to commit. The averment that defendants conspired to commit the offense of corruptly endeavoring to influence a petit jury of the United States in the Circuit Court of the United States for the district of Oregon does not describe an offense. It states a mere conclusion of the pleader. Nothing is added to the generic terms by which such crime is described, except the statement that the jury was a petit jury, and was in the Circuit Court of the United States for the district of Oregon. The acts which were intended in this crime, and which are necessary to its commission, are not set forth."

In a well considered decision (In re Greene, 52 Fed., 104, 111-2, 114), the court said:

"The several counts of the present indictment must be tested, not by the general recitals and averments thereof, although, in the words of the statutes, but by the specific acts or particular facts, which are alleged to have been actually done and committed by the accused. If the particular acts or facts charged do not, as a matter of law, constitute contracts, combinations, or conspiracies in restraint of trade and commerce among the several states, or a monopoly or attempt to monopolize any part of such trade or commerce, no amount of averments and allegations that the accused 'engaged in a combination,' or 'made contracts in restraint' of such trade or commerce, or 'monopolized' or 'attempted to monopolize' the same, will avail to sustain the indictment. *Whether the accused is charged with an offense is to be determined by the particular acts or facts set forth, and not by the conclusions of the pleader*, although asserted in the words of the statute: 'Every offense consists of certain acts done or omitted under certain circumstances, and in the indictment for the offense it is not sufficient to charge the accused generally with having committed the offense, but all the circumstances constituting the offense must be specially set forth.' U. S. vs. Cruikshank, 92 U. S., 542, 563. * * * Stripping the indictment of its verbiage—its general recitals and conclusions of law—does either count thereof charge any real offense against the United States over which the District Court of Massachusetts has jurisdiction? * * * The charge is too vague and general to show a 'contract' in restraint of trade, such as the first section of the act contemplates and declares illegal. It can not be aided by presumption or intendments. It is bad upon its face, and charges no offense committed in the state of Massachusetts, of which the United States courts in that state could take jurisdiction."

The indictment must allege the necessary facts to charge the crime.

U. S. vs. Green, 136 Fed., 618, 659.

In Evans vs. U. S., 153 U. S., 584, 587, the court says:

"The crime must be charged with precision and certainty, and every ingredient of which it is composed must be accurately and clearly alleged. * * * Even in the cases of

misdemeanors, the indictment must be free from all ambiguity, and leave no doubt in the minds of the accused and the court of the exact offense intended to be charged, not only that the former may know what he is called upon to meet, but that, upon a plea of former acquittal or conviction, the record may show with accuracy the exact offense to which the plea relates."

In United States vs. Britton, 107 U. S., 655, 669, where the defendant was charged with a wilful misapplication of the funds of a bank, Mr. Justice Woods said:

"It would not be sufficient simply to aver that the defendant 'wilfully misapplied' the funds of the association. * * * There must be averments to show how the application was made, and that it was an unlawful one."

"As the indictment must contain a specific description of the offense, it is not enough to state a mere conclusion of law."

Whart. Crim. Pl. and Pr. (9th Ed.), section 154.

V.

TEST OF LEGAL SUFFICIENCY OF INDICTMENTS.

The legal sufficiency of these indictments, in so far as it is claimed that they contain a charge of a criminal conspiracy "to defraud the United States in any manner or for any purpose," must be *solely tested* by the allegations contained in the conspiracy charge proper, being the first two paragraphs of each indictment. (Record, page 2). The allegations of the overt acts, however numerous or specific, can not be referred to or considered for the purpose of supplying the omission of the essential allegations which should appear in the charging part of the indictments, wherein the formation and purpose of the conspiracy is attempted to be alleged.

The rule is thus laid down in United States vs. Britton, 108 U. S., 199, 205:

"It follows that as a rule of criminal pleading that in an indictment for conspiracy under section 5440, the conspiracy must be sufficiently charged, and that it can not be aided by the averments of acts done by one or more of the conspirators in furtherance of the object of the conspiracy."

The principle thus stated has been approved, affirmed and applied in

Pettibone vs. United States, 148 U. S., 197, 203.

United States vs. Milner, 36 Fed., 890.

United States vs. Taffe, 86 Fed., 113, 115-6.

Conrad vs. United States (C. C. A., 5th Cir.), 127 Fed., 798, 801.

Stearns vs. United States (C. C. A., 8th Cir.), 152 Fed., 900, 904.

People vs. Willis, 54 N. Y. S., 130, 137, citing other authorities.

Commonwealth vs. Shedd, 7 Cushing, 514.

In the determination, therefore, of the legal sufficiency or insufficiency of the indictments, or either of them, the court should confine its investigations to the essential matters alleged in the conspiracy charge proper, wholly ignoring, for the purpose of determining the sufficiency of the indictments, the allegations of the overt acts.

The office of the overt act in a conspiracy indictment is defined by the Supreme Court, in United States vs. Britton, supra (page 204):

"The offense charged in the counts of this indictment is a conspiracy. This offense does not consist of both the conspiracy and the acts done to effect the object of the conspiracy, but of the conspiracy alone. The provision of the statute, that there must be an act done to effect the object of the conspiracy, merely affords a *locus penitentiae*, so that before the act done either one or all of the parties may abandon their design, and thus avoid the penalty prescribed by the statute."

The alleged conspiracy set forth in each of the indictments, when stripped of legal verbiage and repetition, must consist of the allegation of particular acts and facts. Whether or not the accused are charged with a criminal conspiracy to defraud the United States must be determined by the particular acts and facts set forth, and not by the conclusions of the pleader. In order that the court may be enabled to determine whether

the defendants entered into a criminal conspiracy, either the criminal purpose to be accomplished or the unlawful, in the sense of criminal, means must be plainly and expressly declared and pointed out, and this must be done, not by a general statement as a conclusion of law, but by setting forth the facts and circumstances from which the criminal purpose or criminal means may be plainly deduced.

In re Greene, 2 Fed., 111.

People vs. Willis, 54 N. Y. S., 130, 132, and cases supra.

VI.

STRICT CONSTRUCTION AND REASONABLE DOUBT.

Penal statutes must always be construed strictly against the government and liberally in favor of the defendants. Indictments must always be construed strictly against the prosecution and liberally in favor of the accused; "the charge is to be unmistakably set forth in the indictment, and if there be uncertainty or fair doubt whether the law embraces the act, or the indictment sufficiently charges the offense, the doubt is to be resolved in favor of the accused."

"The rules of strict construction in favor of a defendant charged with a crime, as well as the presumption of innocence and the requirement that guilt must be proven beyond a reasonable doubt, are priceless heritages that have come down to us as warnings out of the bloody pages of tyranny and oppression. And while there be some who doubt their present-day necessity, they remain unbroken."

U. S. vs. Keitel, 157 Fed., 396, 404.

"The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislature, not in the judicial department. It is the legislature, not the court, which is to define a crime, and ordain its punishment. * * * To determine that a case is

within the intention of a statute, its language must authorize us to say so. It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated."

U. S. vs. Wiltberger, 5 Wheat., 76, 95-6.

In Todd vs. U. S., 158 U. S., 278, 282, it is said:

"It is axiomatic that statutes creating and defining crimes can not be extended by intendment, and that no act, however wrongful, can be punished under such a statute unless clearly within its terms. 'There can be no constructive offenses, and before a man can be punished, his case must be plainly and unmistakably within the statute.' United States vs. Lacher, 134 U. S., 624; Endlich on the Interpretation of Statutes, Sec. 329, 2d Ed.; Pomeroy's Sedgwick on Statutory and Constitutional Construction, 280."

In Smith vs. Townsend, 148 U. S., 490, 497-8, Mr. Justice Brewer, in defining the doctrine of strict construction of penal statutes, quotes from 1 Bl. Com., 88, as follows:

"Statutes against frauds are to be liberally and beneficially expounded. This may seem a contradiction to the last rule, most statutes against frauds being in their consequences penal. But this difference is here to be taken: where the statute acts upon the offense and inflicts a penalty, as the pillory or a fine, it is then to be taken strictly; but when the statute acts upon the offense, by setting aside the fraudulent transaction, here it is to be construed liberally."

In France vs. U. S., 164 U. S., 676, 682-3, it is said:

"The statute does not cover the transaction, and however reprehensible the acts of the plaintiffs in error may be thought to be, we can not sustain a conviction on that ground. Although the objection is a narrow one, yet the statute being highly penal, rendering its violator liable to fine and imprisonment, we are compelled to construe it strictly. * * * If it be urged that the act of these plaintiffs in error is within the reason of the statute, the answer must be that it is so far outside of its language that to include it within the statute would be to legislate and not to construe legislation."

In Endlich on Interpretation of Statutes, the author, on page 455, says:

"Unless the proper meaning of the language of the statute brings a case within its letter, the rule of strict construction forbids the court to create a crime or penalty by construction, and requires it to avoid the same by construction; and, although the court may be unable to conceive any reason why the case in question should have been omitted, and considers it highly improbable that an omission was intended, it is not at liberty to extend the enactment to cases not included within the clear and obvious import of the language."

To the same effect, see:

Field vs. U. S., 137 Fed., 6, 8.

Bishop on Statutory Crimes, sections 220, 194, 190.

1 Wharton's Criminal Law (9th Ed.), section 28, pages 42-3.

Endlich on Interpretation of Statutes, section 330, page 456.

U. S. vs. Whittier, 28 Fed. Cas. No. 16,688, page 592.

U. S. vs. Reese, 27 Fed. Cas. No. 16,137, page 746.

2 Sutherland on Statutory Construction, 966.

State vs. Beck (R. I.), 43 Atl., 366-8.

State vs. Walsh, 45 N. W., 721.

State vs. Krueger, 35 S. W., 604, 606.

State vs. Dailey, 107 N. W., 1094.

"* * * It can hardly be expected that the well-known requirements of certainty in the allegations of an indictment can be disregarded, and that the court will supply, by inference and argument, the defects or omissions in the indictment. * * * It is a fundamental doctrine in English and American law that there can be no constructive offenses; that, before a man can be punished, his case must be clearly within the law; the charge is to be unmistakably set forth in the indictment, and if there be uncertainty or *fair doubt* whether the law embraces the act, *or the indictment sufficiently charges the offense*, the doubt is to be resolved in favor of the accused."

In re Buell, 4 Fed. Cas., No. 2102, page 589.

In U. S. vs. Clayton, 2 Dill., 219; 25 Fed. Cas. No. 14,814, the court said:

"The principle that the legislative intent is to be found, if possible, in the enactment itself, and that the statutes are not to be extended by construction to cases not fairly and clearly embraced in their terms, is one of great importance to the citizen. The courts have no power to create offenses, but if, by a latitudinarian construction, they construe cases not provided for to be within legislative enactments, it is manifest that the safety and liberty of the citizen are put in peril, and that the legislative domain has been invaded. Of course, an enactment is not to be frittered away by forced constructions, by metaphysical niceties, or mere verbal and sharp criticisms; nevertheless, the doctrine is fundamental in English and American law, that there can be no constructive offenses; that before a man can be punished his case must be plainly and unmistakably within the statute, and if there be any fair doubt whether the statute embraces it, that doubt is to be resolved in favor of the accused. These principles of law admit of no dispute, and have been often declared by the highest courts, and by no tribunal more clearly than the Supreme Court of the United States."

"There is no rule of law better established than where, from a given state of facts, two opposite inferences may be drawn, that inference will be adopted which is lawful and honest, and not that which is unlawful and dishonest."

United States vs. Detroit T. & L. Co., 124 Fed., 393, 400.

"No man is presumed to do wrong or to violate the law, and every man is presumed to know the law."

U. S. vs. Budd, 144 U. S., 154, 163.

The foregoing cases declaring the doctrine of strict construction of penal statutes and holding that if there be fair doubt or uncertainty whether the indictment sufficiently or at all charges an offense, the doubt must be resolved in favor of the accused, has been recently approved and confirmed in Williamson vs. U. S., 28 Sup. Ct. Rep., 163, 175, where the court says:

"But as, of course, *in a criminal case, doubt must be resolved in favor of the accused*, we hold that the indictment does

not charge a conspiracy to suborn perjury in respect of the making of the final proofs, and therefore that there was prejudicial error committed in the instructions to the jury on that subject which were excepted to."

VII.

ALLEGATION OF CONSPIRACY TO DEFRAUD ESSENTIAL.

THE CRIME indictable, under section 5440, is conspiracy "to commit any offense against the United States, or to defraud the United States in any manner or for any purpose."

In neither of the indictments is there any charge of such an offense. The indictments charge that the defendants "unlawfully, corruptly, wickedly and maliciously did conspire, combine, confederate and agree, together and with divers other persons to the said grand jurors unknown, indirectly to obtain from the said United States, for a certain corporation, to wit, The New Mexico Lumber Company, theretofore organized under the laws of the State of Colorado, and then and there existing, and doing business under that name, a large quantity, to wit, 1,117 acres (United States vs. Biggs, 1,760 acres, United States vs. Freeman) of timber lands in excess of the quantity of such lands which the said corporation could lawfully obtain directly from the said United States, regard being had to the laws thereof pertaining to the entry and sale of such lands." (Record, page 2.)

Such language does not charge a conspiracy "to commit any offense against the United States," nor a conspiracy "to defraud the United States in any manner or for any purpose." It simply charges a conspiracy to obtain indirectly what could not be obtained directly by The New Mexico Lumber Company from the United States.

An agreement among the defendants, such as is expressly sanctioned by the Supreme Court in the Budd case, and by the Circuit Court of Appeals in Olson vs. U. S., 133 Fed., 849, would come within the language of these indictments, and sub

ject the defendants to a criminal prosecution for a conspiracy to defraud the United States.

Does the language of the indictments charge either of the conspiracies made criminal by section 5440? Does it charge either a conspiracy to commit an offense against the United States, or a conspiracy to defraud the United States in any manner or for any purpose?

A conspiracy to obtain indirectly what the corporation could not obtain directly is not the charge of a conspiracy either to commit an offense or to defraud. The indictments should explicitly charge that the defendants wickedly, etc., did conspire, etc., to commit an offense against the United States, to-wit: or that the defendants wickedly, etc., did conspire, etc., to defraud the United States in the manner following, to wit, by indirectly obtaining, etc.

The defect must be regarded as a matter of substance, and is one which tends to the prejudice of the substantial rights of the defendants upon the merits, and not merely of form, for it is the right of the defendants, granted by the Constitution, "to be informed of the nature and cause of the accusation," not in vague and ambiguous language, but definitely and specifically, and of the acts which constituted it.

The Circuit Court of Appeals for the Fifth Circuit, in Conrad vs. United States, 127 Fed., 798, 799, has expressly so held. The court in that case says, after first quoting section 5440:

"It is aimed at those who consipre to commit any offense against the United States, or to defraud the United States. The charge here is that the conspiracy was to commit a specific offense against the United States. *It follows that the indictment must charge that the defendants conspired, and that it must state what offense they conspired to commit. Their conspiring is stated in these words:*

"That Nic Conrad and sixteen others, who are named, 'on the 27th day of September, 1902, in the city of New Orleans, Eastern District of Louisiana, New Orleans Division, and within the jurisdiction of this court, did knowingly, unlawfully and feloniously combine, conspire and confederate together and with each other to commit an offense against the United States, to wit.'

"The next step is to describe the offense they conspired to commit. To constitute a good indictment it must charge that the conspiracy was to do some act made a crime by the laws of the United States; and it must state with reasonable certainty the acts intended to be carried out by the conspiracy, so that it can be seen that the object of the conspiracy was a crime against the United States."

The Circuit Court of Appeals for the Eighth Circuit has so held in

Miller vs. United States, 133 Fed., 337, 341-2.

In that case the indictment under section 5440 charged a conspiracy to commit the offense denounced by section 5480. The court, discussing the essentials of such an indictment, said:

"The use of the postoffice establishment of the United States to execute a scheme or artifice to defraud, the intention to use it in this way as a part of the scheme or artifice, the scheme or artifice to defraud itself, and the intention of the defendants to defraud, are essential elements of the offense described in section 5480 of the Revised Statutes; and allegations of facts which fairly show the existence of all these essentials, *together with an allegation of a conspiracy to commit the offense*, are indispensable to a valid indictment under section 5440."

In Pettibone vs. United States, 148 U. S., 196, 202, this honorable court said:

"THE CHARGE MUST BE MADE DIRECTLY AND NOT INFERENTIALLY OR BY WAY OF RECITAL."

Could any charge be more inferential and indirect than this, whether it was intended to charge a conspiracy to defraud the United States or a conspiracy to commit an offense against the United States?

In United States vs. Martin, 26 Fed. Cases, case No. 15,728, on page 1178, the court defines the three requisites of a good indictment to be as follows:

"(1) That the persons named in the indictment did conspire together and enter into an unlawful agreement and combination, which is the legal signification of the word conspire

as there employed. (2) That they so conspired together to commit an offense against the laws of the United States. (3) That one or more of said parties to said conspiracy did some act to effect the object of said unlawful combination and agreement."

In Dealy vs. United States, 152 U. S., 539, the Supreme Court passed upon the sufficiency of an indictment charging conspiracy to defraud the United States of its lands under fraudulent homestead entries. In the indictment so approved the conspiracy was charged as follows: That the defendants "did falsely, unlawfully and wickedly conspire, combine, confederate and agree together among themselves *to defraud* the United States of the title and possession of large tracts of land in said county of great value by means of false, feigned, illegal and fictitious entries of said lands under the homestead laws of the United States, etc."

In Wright vs. United States (C. C. A., 5th Cir.), 108 Fed., 805, the indictment charged a conspiracy by the defendants to defraud the United States of the title and possession of large tracts of land by means of false, feigned and fictitious entries of lands under the homestead laws. In this case the charge of the indictment of the purpose of the conspiracy was in the following language: That the defendants, naming them, "unlawfully did conspire *to defraud* the United States." The court held that the indictment thus worded was sufficient.

In Olson vs. United States, 133 Fed., 849, 853, the Circuit Court of Appeals for the 8th circuit has considered the sufficiency of an indictment similar to the ones before this court; the court said:

"It is urged that the indictments were insufficient, in that they do not set forth facts sufficient to constitute a public offense. Much of the argument in support of this proposition is based upon the theory that the indictment should show an enforceable agreement, one good under the statute of frauds. This question we have already disposed of against such contention. In every other respect we think the indictment upon which defendant was convicted unassailable. *It charges the several defendants with having entered into a conspiracy. To do what? To defraud the United States* out of the title and

possession of a large quantity of lands in the district of Minnesota, a portion of which are specifically described. How was this fraud to be consummated? The indictment says by means of false, fraudulent, feigned, untrue and illegal entries of said lands, under that certain act of Congress approved June 3, 1878, etc. The indictment then charges the overt act, to wit, that Olson, Mahon and Agatin persuaded and induced Dwello, upon entering the land, in the United States Land Office at Duluth, Minn., to make a false oath, etc., specifying the particulars in which the oath was false. Thus it will be seen the indictment charges the unlawful combination, the illegal purpose to be attained, the means by which it was to be attained, and the overt act upon the part of some of the alleged conspirators. This, we think, sufficient. Dealy vs. United States, 152 U. S., 539; 14 Sup. Ct., 680; 38 L. Ed., 545."

The present indictments do not charge "the illegal purpose to be attained" as prescribed by section 5440, to wit, to commit an offense against the United States or to defraud the United States; nor sufficiently "the means by which it was to be attained;" no reference is made to the timber and stone act nor to the alleged regulations of the land office.

VIII.

Further imperfections existing in the opening paragraph of each of the indictments, under the foregoing authorities declaring the manner and form which the pleader for the government should zealously follow in drawing indictments of this nature, are:

1. The failure of the indictments to set forth and allege under *what* "laws of the said United States pertaining to the entry and sale of timber lands and under (*what*) regulations theretofore made and prescribed pursuant to law by the Commissioner of the General Land Office, with the approval of the Secretary of the Interior," the specific lands which the defendants are charged with having conspired indirectly to obtain from the government, were "open to entry at the land office of the said United States at Durango aforesaid." (Record, page 2.)

As will be hereafter shown, timber lands were subject to entry under various scrip laws of the United States, as well as under the timber and stone act. The presumption of innocence and of full compliance with the law on the part of the defendants requires the specific and definite allegation that the timber and stone act was the "law" of the United States under which the defendants conspired to indirectly obtain the lands in question, and under which the said lands were subject to entry at the Durango land office, and similar specific and definite allegations concerning the alleged regulations of the land department.

2. The averments touching and referring to the alleged timber character of the lands forming the subject-matter of the alleged conspiracies amount merely to a statement of an opinion or theory, and do not amount to a statement of the essential facts from which the actual character of said lands would appear; in other words, they are merely statements of legal conclusions, drawn by the pleader from the evidence he had before him at the time the indictments were drawn.

The language of each indictment is:

"Which said timber lands * * * were lands lying within the Durango land district, * * * which were surveyed vacant public lands * * * not included within any military, Indian or other reservation; lands which had not been offered at public sale according to law, and which were unfit for cultivation, *chiefly valuable for timber.*" (Record, page 2.)

"Facts are to be stated, not conclusions of law alone."

U. S. vs. Cruikshank, 92 U. S., 542, 558.

3. The lands which the defendants are charged with having conspired indirectly to obtain, which The New Mexico Lumber Company could not directly obtain, are certain particular lands; the conspiracy charged is not a general conspiracy to obtain government lands; the defendants are not accused of having conspired to obtain an indefinite and unlimited number of acres of land. But the charge is definite, 1,117 acres in one case, and 1,760 in the other, "descriptions of which said lands by legal subdivisions are set forth in that part of this indict-

ment where the said Charles H. Freeman and Welch W. Nossaman are charged with the committing of overt acts." (Record, page 2.)

By the device set forth in the foregoing language the pleader endeavors to incorporate that portion of each indictment "where the said Charles H. Freeman and Welch W. Nossaman are charged with the committing of overt acts," into the charging part of the indictment. To do so is to abrogate the rule laid down by the Supreme Court of the United States, and in all cases uniformly followed and approved. The cases laying down the principle that the allegations of the overt acts can not be referred to or considered for the purpose of supplying the omissions of essential allegations from the charging portion of the indictment have heretofore been cited. (Supra, V.)

The descriptions of the particular lands which the defendants are accused of having conspired to indirectly obtain and thereby inferentially to defraud the United States of, are essential to the charge alleged. If the defendants are thus attempted to be charged with having defrauded the United States through these alleged conspiracies of certain particular lands, the defendants are certainly entitled to be informed of the descriptions of these lands. The defendants are not so informed, under the authorities, in the cases at bar.

Do the charging portions of these indictments, wherein the crime of conspiracy is laid, inform the defendants of the particular lands which they are charged with having conspired to obtain indirectly from the United States, "so distinctly as to advise the accused of the charge which they have to meet, so fully as to give them a fair opportunity to prepare their defenses, so particularly as to enable them to avail themselves of a conviction or acquittal in defense of another prosecution for the same crime, and so clearly that the court, upon an examination of the indictments, may be able to determine whether or not, under the law, the facts there stated are sufficient to support a conviction?"

Miller vs. U. S., 133 Fed., 337.

This glaring defect in the charging part of each indictment cannot be overlooked nor avoided unless U. S. vs. Britton, 108

U. S., 199, 205; Pettibone vs. U. S., 148 U. S., 197, 203; Commonwealth vs. Shedd, 7 Cushing, 514, and the many supporting cases are to be departed from. There can be no assertion that the pleader and the grand jury did not know the identity of the lands, for it is alleged that they numbered 1,117 acres in the one case and 1,760 in the other, and for their description refer the defendants and the court to the overt acts.

It will not suffice to charge an offense in the general words of the statute. "It must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged."

United States vs. Hess, 124 U. S., 483-7.

"All the circumstances constituting the offense must be specially set forth."

U. S. vs. Cruikshank, 92 U. S., 542, 563.

These indictments are not like the indictment in Dealy vs. U. S., 152 U. S., 539, 542, in this particular. In that case it was alleged the defendants conspired to defraud the United States of lands open to entry at the land office at Devil's Lake City, in the State of North Dakota. This court said "Manifestly the description in the indictment does not need to be any more definite and precise than the proof of the crime," and held that since it did not appear from the conspiracy as charged that the conspirators had in mind any particular tracts of land at the time the conspiracy was formed, but conspired to defraud the United States generally of land in a certain county in a certain state, that there was no need for the indictment to describe the precise lands which were the subject of the conspiracy, for they had not at that time been identified. But, in our indictments, the precise lands had been identified when the conspiracy was entered into; the defendants, so the indictments charge, had picked out 1,117 acres of timber lands in the one case and 1,760 acres in the other, and had then and there conspired to defraud the United States of the same. Says this court, "the description in the indictment does not need to be any more definite and precise than the proof of the crime."

Proof that the conspiracies embraced the particular number of acres charged would be necessary at the trial, as well as their descriptions, and the defendants have not been informed, in the manner required by law, of the conspiracies with which they are charged, in the absence from the charging parts of the indictments of the precise descriptions of the 1,117 acres and the 1,760 acres.

4. Both indictments are bad in failing to set out the facts showing wherein the 1,760 acres in the one case and the 1,117 acres in the other were in excess of the quantity of timber lands which The New Mexico Lumber Company could lawfully obtain directly from the United States, instead of mere conclusions concerning the same.

5. Both indictments refer to The New Mexico Lumber Company as the party for whom the lands were to be indirectly obtained; but neither indictment shows what, if any, relation there was existing between the corporation and the defendants; whether the latter were members, officers, stockholders, employes or strangers.

IX.

ESSENTIALS TO CONSTITUTE THE CRIME HERE ATTEMPTED TO BE ALLEGED.

Upon the argument of the demurrers and motions in the District Court, it was conceded by the government that these indictments attempt to charge conspiracy, *not* to commit any offense or crime against the United States, but to "defraud" the United States. The statute adds the words "in any manner or for any purpose," but these words only refer to some form of attempt to "defraud," so that the definition of that word becomes essential. That is to say, the facts alleged must bring the acts of defendants within the proper definition of the word "defraud," before any crime is charged; hence the inquiry as to the meaning of the word "defraud" as used in section 5440 of U. S. Rev. Stats. becomes important.

We do not deem it necessary to go into this matter in great detail, for nowhere in the *charging* part of the indictments is it alleged that the defendants conspired to *defraud* the United States, but only that they conspired to obtain *indirectly* an excess amount of land. We would, however, make the following suggestions:

The definitions in dictionaries speak of "withholding" property, and of "depriving" of property, by certain means, as amounting to "defrauding," but it is so obvious that only the latter can be involved in this case, that we will omit the former, and we find the following:

To "defraud" is:

"To deprive" another "of a right by deception or artifice."

Bouvier's Law. Dic. (Rawle's Ed.), title "Defraud."

"To deprive of some right, interest or property by deceitful devices; * * * or deprive him of a right by deception or artifice."

13 Cyc., page 766, and note 10.

"To deprive the United States, by the misrepresentation or concealment of material facts, of any kind of property or whatever may be legally due it."

U. S. vs. Owen, 32 Fed., 534, 536.

"Depriving another of a right by deception or artifice."

U. S. vs. Curley, 122 Fed., 738, 740.

The above include the broadest definitions which have been given by courts in construing this conspiracy statute, and they all agree in requiring some form of affirmative action, either by way of misrepresentation of existing facts or by way of what may be called active concealment of such facts, on the part of the alleged conspirators, by means whereof the United States parts with property. What is said in these indictments about the "governmental functions" of the United States applies solely to the manner of its parting with its property, and, unless the United States parted with some lands, it is certain that its "governmental functions" have not been disturbed.

It is certain:

That these indictments do not relate to any withholding of anything from the United States.

That, under any true definition of "DEFRAUD," the indictment must show, for these cases:

(a) That property has passed from the United States.

(b) That the conspiracy contemplated the making of some representation known to be false, but for which false representation the United States would not part with the land; OR the wilful or active covering up or concealment of some fact which, if known, would prevent the United States from parting with the land.

The indictments are absolutely defective as to the latter requirements.

X.

NO OFFENSE CHARGED.

The parts of these indictments which attempt to charge the defendants with a conspiracy *indirectly* to obtain from the United States for The New Mexico Lumber Company a large quantity of timber land in excess of the quantity of such land which said company could lawfully obtain *directly* from the United States, do not charge the commission of a crime under the statute.

1. The statutes of the United States "pertaining to the entry and sale of timber land" (and it must be kept in mind that this indictment does not point out any one law which is supposed to have been violated, but refers to all of the laws) contain a multitude of provisions for the issuance of various kinds of scrip, whereby timber lands may be entered lawfully in any quantities and directly; so that, under these "laws of the United States," if The New Mexico Lumber Company desired 1,760 acres, or any other number of acres of timber land, all it need do was to go, or send agents, into the open market and secure this scrip and therewith purchase the land. These conditions are so notorious that exhaustive citations are unnecessary and we will make only a few.

The scrip laws in force at the times mentioned in these indictments, under which probably more timber land was entered than under any other scrip laws, are clauses of the act of June 4, 1897, 30 Stat., 36, under which large quantities of scrip were issued, which might lawfully be located upon any "vacant land open to settlement;" also, an act of June 6, 1900, 31 Stat., 614, by which it is provided that such selections "shall be confined to vacant, surveyed, non-mineral public lands, which are subject to homestead entry."

These acts were universally recognized by all branches of the government as authorizing the location of timber lands, and this continued to be the case until the passage of "an act prohibiting the selection of timber lands in lieu of lands in forest reserves." Approved March 3, 1905. 33 Stat. at Large, 1264.

This last act quite clearly recognizes the right to locate such scrip on timber land up to this last mentioned date—a right which would seem to have necessarily followed from the fact that all the relinquishments whereon the scrip were issued were necessarily relinquishments of timber lands included in forest reserves.

The provisions near the foot of page 620 of 30 Stats. at Large, in the act of July 1, 1898, and section 2306 of Rev. Stats., together with the act of August 18, 1894, 28 Stats. at Large, 397, are laws under which much scrip of this character was issued.

These references will serve for illustrations. From them it is clear that, under the laws of the United States, it was and would have been at the times of the supposed conspiracies very easy for The New Mexico Lumber Company *directly* to have acquired from the United States all the timber land which it desired, and all and more than it is claimed it conspired to obtain indirectly.

If the United States intended in these indictments to charge the defendants with a conspiracy to obtain more than a limited quantity of land, the statute limiting the quantity which may be entered should, in some manner, be indicated so that there could be no uncertainty about the statute under which the indictments were brought. If, for example, the pleader had in

his mind the timber and stone act of 1878, he should in some appropriate manner have indicated that act.

2. Having thus shown the impossibilty of defrauding the United States by the direct purchase of land in any possible quantity, and the error of the statement in the indictments that The New Mexico Lumber Company could not directly obtain what they, the defendants, are charged with having conspired to obtain indirectly, we will next consider the matter of indirectly procuring lands. The only statute under which it is by the government claimed in this case that any possible indirect procurement of lands could become a fraud is the timber and stone act, supra, 20 Stat. at Large, 89, as amended by the act of 1892.

In U. S. vs. Budd, 144 U. S., 154, 163, arising under the timber and stone act, the lands applied for and entered were conveyed by the entryman (Budd) to one Montgomery, twenty-four days after payment was made at the local land office, and five months before the issuance of patent. It was urged that thereby a fraud had been practiced against the United States. This court, however, said:

"But surely this amounts to little or nothing; it simply shows that Montgomery wanted to purchase a large body of timber lands, and did purchase them. *This was perfectly legitimate, and implies or suggests no wrong.* The act does not in any respect limit the dominion which the purchaser has over the land after its purchase from the government, or restrict in the slightest his power of alienation. All that it denounces is a prior agreement, the acting for another in the purchase. If, when the title passes from the government, no one save the purchaser has any claim upon it, or any contract or agreement for it, the act is satisfied. Montgomery might rightfully go or send into that vicinity and make known generally, or to individuals, a willingness to buy timber lands at a price in excess of that which it would cost to obtain it from the government; and any person knowing of that offer might lawfully go to the land office and make application and purchase a timber tract from the government, and the facts above stated point as naturally to such a state of affairs as to a violation of the law by definite agreement prior to any purchase from the government—point to it even more naturally, for no man is presumed to do wrong or to violate the law, and every man is presumed to know the law."

This ruling was made in an equity case, a civil suit, wherein a decree dismissing a bill filed by the United States was affirmed.

The word "defraud" (used only in the concluding part of the indictments) might have a much broader meaning in such a case, as we have herein pointed out, than it can possibly have in a criminal case. It is certain that the defendants could not conspire to "defraud" the United States under the timber and stone act, except by means of agreements for conveyance made prior to the time when the original or first application is made for the land, and affecting and proving that application contrary to the oath required specifically by the statute to be made in support of and as a part of the application.

In the case of an indictment under section 5440, R. S., for a conspiracy to defraud the United States by obtaining timber lands under the timber and stone act, the Circuit Court of Appeals for the Eighth circuit, reversing a judgment of conviction, in Olson vs. U. S., 133 Fed., 849, 852, says:

"The provisions of this statute were before the Supreme Court and considered in the U. S. vs. Budd, 144 U. S., 154; 12 Sup. Ct., 575; 36 L. Ed., 384, and by this court in the U. S. vs. D. T. & L. Co. (C. C. A.), 131 Fed., 668.

"In the first case the Supreme Court held that the statute did not 'limit the dominion which the purchaser has over the land after its purchase from the government, or restrict in the slightest his power of alienation;' that the statute only prohibited his entering the land under an agreement whereby he was acting for another; that he might make a valid entry of such lands, though with a view of disposing of the same after he had completed the purchase, provided that at and before the time of such purchase he had not entered into an agreement with another, whereby such other should receive any of the benefit of such purchase.

"In the U. S. vs. D. T. & L. Co., this court held that what the statute prohibited was not alone a prior agreement that the title, or any part thereof, which the purchaser should acquire, should be conveyed to another, but that the land should not be acquired on speculation for the use and benefit of another.

"In the light of these decisions, as well as a sensible construction of the statute, we have no hesitancy in holding its true

meaning to be that any citizen of the United States may purchase lands as herein provided, where such purchase is for his own exclusive use and benefit, notwithstanding at the time of such purchase he may have in contemplation a future sale for a profit; that what the statute denounces is that a party shall not, at the time of the purchase, have, directly or indirectly, made any agreement or contract in any way or manner, with any person or persons, by which the title which he may acquire shall inure, in whole or in part, to the benefit of any person except himself; that the application for the land must be made in good faith for his own exclusive use and benefit, and not as the agent or hireling of another to obtain the land for some one besides himself."

From these two opinions, taking the language in connection with the facts of the cases as reported, it seems reasonably clear that if the defendants herein persuaded various proper and competent persons to make entries of timber lands, even furnishing the money with which such entries were to be made, on a promise that thereby they could realize a profit in the future, but carefully avoiding every form of agreement to purchase the property until after the application, or at most, the entries were complete, and then showing the parties how they might make the expected profit by selling the lands, they would not be guilty under this statute.

The opinion in the Olson case also further shows exactly how the timber and stone act, if it were the act intended by the pleader herein, should have been pointed out in the indictments, and further shows how the pleader herein should have framed his allegations in regard to any supposed conspiracy whereby false representations were to be made to the government.

Similar precedents are found in:

Ex Parte Black, 147 Fed., 832.

Gesner vs. U. S., 153 Fed., 46.

From all this it appears that it is necessary for the indictment, in order to charge the crime, to show:

(a) That the supposed conspiracy contemplated the making of a contract, *before* the application, whereby some entry-

man contracted to convey the land which he should enter to The New Mexico Lumber Company.

(b) That the supposed conspiracy also contemplated that some one or more of the conspirators should make, or should procure to be made by some one else, some representation to the United States or to some of its officers, that no such contract existed.

Both of these elements are essential to constitute a defrauding of the government.

In the light of these principles, let us see what the indictments really do say. There is an abundance of adjectives of an uncomplimentary nature, but they certainly can not take the place of facts, and the only words in the indictments from which it may be claimed that any of those elements can be inferred are the clauses wherein it is said that the lands mentioned were to be obtained by the defendants soliciting and procuring certain entrymen, "for hire and under agreements with them separately to that end," to do four things, to wit:

(a) To pay for the lands with money furnished by the company;

(b) To make individual entries of land in quantities permitted by law;

(c) To secure patents thereon; and

(d) To convey the same to William Barth or to The New Mexico Lumber Company.

We have purposely said that these are the only averments from which it may with the slightest possibility be contended that the alleged defrauding might be *inferred*, for we are sure that it can not be even plausibly claimed that it is anywhere directly alleged.

The language in question used in the indictments is:

"The said timber lands were so to be obtained as aforesaid, from the said United States, for the said corporation, by the said defendants soliciting and procuring the persons aforesaid, for hire and under agreements with them separately to that end, to pay to the receiver of the said land office, with moneys to be furnished to them by the said corporation, the

price fixed by law therefor, make entries as individual entrymen, at the land office aforesaid, with the said register, of tracts of such lands in quantities respectively not exceeding the quantities allowed by the said laws and regulations, secure patents from the said United States for the said lands to themselves as such entrymen, and make conveyance of the title to the said lands to one William Barth" (in the one case and to the corporation directly in the other case). (Record, page 2.)

The foregoing statement of the object, scope, means and manner of carrying out the alleged conspiracy does not sufficiently charge the same. The manner and means by which the conspiracy was to be carried out are charged, so far as at all, only inferentially and by way of recital, and these attempts do not constitute allegations of facts, which all pleading, criminal as well as civil, requires. Especially do the attempted allegations in the foregoing paragraph appear to be insufficient in the light of the rule laid down by this honorable court in Pettibone vs. United States, 148 U. S., 197, 202, quoted supra, and reading in part as follows:

"The general rule in reference to an indictment is that all of the material facts and circumstances embraced in the definition of the offense must be stated, and that, if any essential element of the crime is omitted, such omission can not be supplied by intendment or implication. *The charge must be made directly and not inferentially or by way of recital.*"

It is clear that the pleader has not said that any agreement to convey the lands to The New Mexico Lumber Company was made at any time before the entries, nor is there any direct allegation that there were to be any feigned, false or fraudulent entries or affidavits to procure them.

The date of the pretended conspiracy in one indictment is stated as March 30, 1901, and in the other indictment as August 25, 1899, but in each case great care is taken to allege that the conspiracy was continuous from those dates up to June 22, 1907, and there is no distinct averment that any of the agreements referred to were made at the date of the conception of the conspiracy or at any other fixed date. It would have been very easy for the pleader to say that these things were done

under agreement, made or to be made, with said entryman before the application to purchase the lands, had the facts before him have permitted of such an allegation, or it would have been easy to say that the conspiracy was a conspiracy which included a requirement upon the entrymen to make conveyance of the lands in accordance with agreements made with them prior to such application; but the pleader has not alleged any date, either directly or relatively, for the making of the agreements, or showing or even tending to fix the dates of these agreements as of a time prior to the applications to purchase. That they were to be made after the conception of the conspiracy is a necessary inference from the indictment, but when the indictments are absolutely silent on this point, and when the Supreme Court has said, in a case concerning the timber and stone act: "All that it denounces is a prior agreement, the acting for another in the purchase. If, when the title passes from the government, no one save the purchaser has any claim upon it, or any contract or any agreement for it, the act is satisfied," U. S. vs. Budd, 144 U. S., 154, 163, it is clear that the contract to convey before the entry must in some form be specifically alleged and not left to inference or argument. So far as any allegations of the indictments go, the agreement to convey may have been made not only after application, but after issuance of final receipt. At either of these times the agreement would be perfectly lawful.

The court will note that this expression of this honorable court is contained in a case where the entryman paid for the land on November 10, 1882, and conveyed it on December 4, 1882, while the patent did not issue until May 5, 1883, thus conclusively showing that when the court speaks of the title passing from the government, the date of the payment for the land is the latest date to which that expression can be attributed.

We have already alluded to the manner in which these indictments allege that the defendants "unlawfully, corruptly, wickedly and maliciously did conspire, combine, confederate and agree together" to procure from the United States indirectly more land than the company could have procured directly, and we have shown that it was very easy, either directly or indirectly, to procure all of that land without violat-

ing any law of the United States, but we are nowhere told in the indictments that, either with or without that multiplicity of adjectives and offensive adverbs with which they abound, the defendants, or any of them, entered into any conspiracy whatever to do any other act whatsoever; on the contrary, all of the expressions above quoted are omitted when we come to the clause in the indictments which mildly remarks, without alleging any time whatsoever, that the lands "*were so to be obtained*" by the defendants "soliciting and procuring" certain parties to do certain things which we have heretofore specifically mentioned. In fact, the pleader does not even say that defendants *conspired* or *agreed* that said lands "were so to be obtained." The language employed is employed by way of recital and intendment, and is not in the form of direct allegations as required by the law in such cases. We are, indeed, told that the defendants were to hire these persons to do these things. We are also told that these persons were to do these things "under agreements," but all the time the pleader cautiously avoids telling us when any of these agreements were made, or were to be made. It might well be true, for aught that appears in these indictments, that several different agreements were made with each individual at different times. For instance, it might be true—and these indictments contain nothing which negatives the idea—that these defendants at one time hired men to make entries, knowing all the time that when the entries were made the men would be glad to sell the property and then later on, after the entries were complete, made further agreements whereby these lands were to be conveyed to The New Mexico Lumber Company, and none of this would "defraud" the United States in any manner or for any purpose.

We have already seen that the law requires that when we deal in presumptions, the presumptions must all be in favor of the innocence of the parties, and this alone involves no more violent presumption than it does to infer that the agreements were all made prior to the inception of the entries.

Even the agreement to furnish them the money with which they could make the entries, as we have shown, does not involve any wrong under the act.

But, as we have seen, there must yet be the further element of some false representation to be made before we can say that the defendants defrauded the United States. The defendants, for example, might well agree and contract for a valuable consideration with an entryman that that entryman would, in some lawful manner, procure title to these lands and convey them to The New Mexico Lumber Company, and this agreement might even precede the entry, and yet to make the conspiracy criminal, it must affirmatively appear that it was the intention of the conspiracy that the entryman in making his entry should make some false representation to the United States, some representation of a fact which induced the United States to part with the land, and without which the United States would not have parted with the land. If the agreements made by the defendants with the entryman were general and were simply agreements that they would, in some manner, enter those lands, it is to be presumed, in the absence of averment to the contrary, that some lawful form of entry was contemplated. We have already shown that lawful entries could be made by any one by the purchase of proper scrip and the proper location thereof, and yet, when we come to the indictments, the only thing which they say that these parties were employed to do was to "make entries." We are not told that they were to "make entries" under the Timber and Stone Act, and a mere hiring of them to "make entries" carries with it no necessary implication that the United States would be defrauded, when entries might easily be made in a perfectly lawful manner.

We have already cited the authorities to the effect that allegations as to a conspiracy can not be aided by the allegations as to the overt acts, but if we were to waive this principle and were to assume that the Timber and Stone Act is the act which is really referred to when the pleader in general terms talks about the "laws" of the United States, even then, when we turn to the allegations of overt acts, we find it alleged that certain persons were procured to execute certain documents, each of which documents is entitled "Testimony of Claimant," and in each case we are carefully told that this document was

"in form prescribed by law." This form of allegation cuts off all possible reference to possible department regulations and leaves us with the information that these documents contained whatever the law required. Each of the overt acts charged relates exclusively to a time subsequent to the "written statement" required by section 2 of the Timber and Stone Act, and since *all* the language in each indictment speaks as of a time necessarily subsequent to the time of the "written statement" required by section 2, the indictments fail to charge other than an innocent act. It is impossible that the conspiracies charged should be considered as relating to other than the making of final proof under section 3 of the act, because on the very day the conspiracies are alleged to have been formed, August 25th, 1899, and March 30th, 1901, respectively, the first overt acts charged were performed. The conspiracies entered into on the days, respectively, alleged, could not have contemplated the procuring of applications to purchase and the making of the "written statements" required by section 2 of the act, for otherwise the overt acts charged relating to the inducing of the entrymen to execute and verify the documents, entitled "Testimony of Claimant," could not have occurred on the very day of the formation of the conspiracy.

Still insisting upon, and not waiving, the point that this is an entirely insufficient way in which to plead these documents, when we turn to the timber and stone act we are utterly unable to find any reference to any document called "Testimony of Claimant." We find that the second section of the act provides that the first step which must be taken by a person desiring to purchase land under that act is to file with the register of the land office a "written statement" in which, among other things, he is required to set forth a representation "that he has not, directly or indirectly, made any agreement or contract in any way or manner with any person or persons whatsoever by which the title which he might acquire from the government of the United States should inure in whole or in part to the benefit of any person except himself."

It provides that this statement must be verified by the oath of the applicant. But an affidavit of this sort would not be described by the words "Testimony of Claimant."

The third section of the act requires the person desiring to purchase to furnish "satisfactory evidence" on two points, the first of which is that he has published a notice in accordance with law, and the second is that the land is of a certain character, but not a word can be found in the law which intimates that this "satisfactory evidence" is to contain any statement whatsoever with regard to contracts or agreements, and yet this is the only paper which it would seem could reasonably be called testimony.

If it should be claimed that there is a land department regulation requiring such showing, it is sufficient to reply, but none such is pleaded, and, to be relied upon, it must be pleaded.

United States vs. Bedgood, 49 Fed., 54, 58.

But, if such land department regulation existed and were pleaded, this would be of no avail. Such rules and regulations cannot be made the basis of an indictment for the commission of a crime.

U. S. vs. Eaton, 144 U. S., 677, 687-8.
U. S. vs. Maid, 116 Fed., 650.
U. S. vs. Blassingame, 116 Fed., 654.
Anchor vs. Howe, 50 Fed., 366.
U. S. vs. Howard, 37 Fed., 666.
Hoover vs. Salling, 110 Fed., 43.
U. S. vs. Manion, 44 Fed., 801.
U. S. vs. Hoover, 133 Fed., 950.
U. S. vs. Matthews, 146 Fed., 306.
U. S. vs. United Verde Copper Co., 196 U. S., 207.
Williamson vs. U. S., 28 Sup. Ct. Rep., 163, 177.

In United States vs. Eaton, 144 U. S., 677, 687-8, it is said:

"Much more does this principle apply to a case where it is sought substantially to prescribe a criminal offense by the regulation of a department. It is a principle of criminal law that an offense which may be the subject of criminal procedure is an act committed or omitted 'in violation of a public law, either forbidding or commanding it.' 4 American & English Encyclopedia of Law, 642; 4 Bl. Com., 5.

"It would be a very dangerous principle to hold that a thing prescribed by the commissioner of internal revenue as a needful regulation under the oleomargarine act, for carrying it into effect, could be considered as a thing 'required by law' in the carrying on or conducting of the business of a wholesale dealer in oleomargarine, in such manner as to become a criminal offense, punishable under section 18 of the act. * * *

"It is necessary that a sufficient statutory authority should exist for declaring any act or omission a criminal offense. * * *

"Regulations prescribed by the president and by the heads of departments, under authority granted by congress, may be regulations prescribed by law, so as lawfully to support acts done under them and in accordance with them, and may thus have, in a proper sense, the force of law; but it does not follow that a thing required by them is a thing so required by law as to make the neglect to do the thing a criminal offense in a citizen, where a statute does not distinctly make the neglect in question a criminal offense."

"The intention of a penal statute must be found in the language actually used, interpreted according to its fair and obvious meaning."

U. S. vs. Harris, 177 U. S., 305, 309.

Hoover vs. Salling, 110 Fed., 43, decided by the Circuit Court of Appeals of the 7th circuit, is particularly in point, because the regulations there involved were the regulations of the land office concerning stone and timber entries, under the timber and stone act.

In St. Paul, etc., Co. vs. Phelps, 137 U. S., 528, 536, the court said:

"Where a statute * * * is clear and free from all ambiguity, we think the *letter* of it is not to be disregarded in favor of a mere presumption as to what is termed the *policy* of the government, even though it may be the settled practice of the department."

In Hadden vs. The Collector, 5 Wall., 107, 111-2, the court said:

"What is termed the policy of the government with reference to any particular legislation is generally a very uncertain

thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes."

In Deming vs. M'Claughry, 113 Fed., 639, 641, the Circuit Court of Appeals for the Eighth circuit said:

"It is the function and duty of the judicial department of the government to construe its statutes and to declare their meaning. That duty the courts may not renounce or abandon to others, and in its discharge they must exercise their own independent judgments, guided only by the established principles of the law and the recognized canons of interpretation. While the opinions of the officers of the executive department of the government may be permitted to lead the way to the proper construction of ambiguous statutes intrusted to them to enforce, yet, where the words of the acts are plain, and their meaning is clear, these must prevail."

It therefore appears that none of the overt acts charged the making of any statement whatsoever in regard to whether or not any contract of purchase had been made, and we are compelled to resort to inference, presumption or implication as to the law referred to in order to assume that any statement whatsoever was contemplated by any one, and, as already shown, there is absolutely not one word in the indictment indicating that entries under the "timber and stone act" were the entries which the defendants expected were to be made or which the defendants procured to be made.

As stated by Judge Lewis in his opinion in passing upon these indictments, they set in where the second section of the timber and stone act leaves off. Section 2 of the timber and stone act provides that any person desiring to avail himself of the provisions of this act shall file with the register of the proper district a verified written statement, designating the particular land he desires to purchase, in which statement it must be set forth that the same is unfit for cultivation and valuable chiefly for its timber or stone; that it is uninhabited, contains no mining or other improvements (with certain exceptions), nor valuable mineral deposits; that applicant has

made no other application under this act, that he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit; "and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the government of the United States should inure, in whole or in part, to the benefit of any person except himself." A violation of this provision of section 2, and falsely swearing in relation thereto, subjects the offender "to all the pains and penalties of perjury," and inflicts a forfeiture of the money which he may have paid for the land and all his right and title to the same.

If the conspiracy charged in these indictments was based upon the circumvention of section 2 of the timber and stone act, it would amply supply all the demands of the second clause of section 5440, R. S.

It is to be observed that there is no allegation that any false statement in these particulars or in violation of this section was made; on the contrary, the statement so required is shown to be true.

Section 3 of the act provides that upon the filing of said statement or application to purchase, the register shall post a notice of such application for a period of sixty days and shall furnish the applicant with a copy of the same for publication in a newspaper published nearest the location of the land for a like period; "after the expiration of said sixty days, if no adverse claim shall have been filed, the person desiring to purchase shall furnish to the register of the land office satisfactory evidence, first, that said notice of the application prepared by the register as aforesaid was duly published in a newspaper as herein required; secondly, that the land is of the character contemplated in this act, unoccupied and without improvements, other than those excepted, either mining or agricultural, and that it apparently contains no valuable deposits of gold, silver, cinnabar, copper or coal; and upon payment to the proper officer of the purchase money of said land, together with the fees of the register and the receiver, * * * the applicant may be permitted to enter said tract, and, on the trans-

mission to the general land office of the papers and testimony in the case, a patent shall issue thereon."

The date or time when the hiring and agreements to make entries were to be made by the conspirators is not charged in the indictments; there is no charge that the "persons aforesaid" were to be hired to make applications to purchase, nor to make false and fraudulent "written statements," nor that said hiring was to be accomplished and said agreements entered into prior to the making of the applications to purchase. The indictment endeavors to challenge the propriety and validity of acts to be done by the "persons aforesaid" after the applications to purchase had been made and the "written statements" had been sworn to before and filed with the register of the land office by the respective applicants; in other words, acts done by the applicants under the provisions of section 3 at the time the lands were "entered" and payment therefor made.

In the absence of any prohibition in the timber and stone act, how can it be said that it is a criminal fraud practiced against the government of the United States, for an intending qualified citizen of the United States, after his application to purchase and his sworn "written statement" have been made and filed, to contract to sell in *futuro* the lands he has honestly and in good faith applied to purchase, and to obtain from his purchaser expectant the funds to make such payment?

The Act of March 2, 1867 (14 Stat. at L., 541), provides that when any portion of the public lands has been settled upon and occupied as a town-site, the corporate authorities may enter the same at the land office in trust for the occupants thereof.

In Hussey vs. Smith, 99 U. S., 20, it appears that under this act the mayor of the city of Salt Lake entered certain lands as the town-site of that city. A certain lot thereof had been for many years in the possession and occupation of one Job Smith; prior to the entry of the town-site by the mayor, Smith had twice mortgaged his lot to secure the payment of certain sums of money. The first mortgagee foreclosed and by a mesne conveyance the title obtained at the foreclosure sale passed to the plaintiff Hussey. Both Smith and Hussey applied to the

Probate Court for deeds to the lot. It was adjudged that Smith was entitled to a deed therefor. Hussey appealed to the Supreme Court of the United States. Delivering the opinion of the court, Mr. Justice Swayne says:

"The Act (of March 2, 1867) does not prohibit a sale, but is silent upon the subject. * * * There can be no question that under the Act of Congress of March 2, 1867 (14 Stat., 541), Smith had an equitable interest in the premises in controversy which he could sell and convey."

In Lamb vs. Davenport, 18 Wall., 307, 314, this court, holding that, unless forbidden by some positive law, contracts made by actual settlers on the public lands concerning their possessory rights, and concerning the title to be acquired in the future from the United States, are valid as between the parties to the contract, though there be at the time no act of Congress by which the title may be acquired, and though the government is under no obligation to either of the parties in regard to the title, said:

"The right of the United States to dispose of her own property is undisputed, and to make rules by which the lands of the government may be sold or given away is acknowledged; but, subject to these well-known principles, parties in possession of the soil might make valid contracts, even concerning the title, predicated upon the hypothesis that they might thereafter lawfully acquire the title, except in cases where congress had imposed restrictions on such contracts."

In Gaines vs. Molen, 30 Fed., 27, 29, the plaintiff had been the occupant of certain public lands; the defendant also had some claim to the ground. By quit-claim deed the plaintiff conveyed his interest in the land to the defendant, the defendant agreeing to convey to the plaintiff an undivided one-half interest in the property within thirty days after acquiring title from the government. The defendant, upon receipt of title, refused to convey to the plaintiff. The court, enforcing specific performance of the contract, said:

"The contract which was made was in no manner a violation of any act of congress, nor did it contravene any public policy. It was a contract between two parties who might pos-

sibly be contesting claimants under some future act of congress for a settlement of their respective claims. The case of Southerland vs. Whittington, 46 Ark., 285, is very much in the point, and the decision of that learned court is in accord with the views I have expressed."

In Southerland vs. Whittington, 46 Ark., 285, 289, upon facts very similar to those in the last case, the Supreme Court of Arkansas reached the same conclusion, saying:

"There was no law forbidding claimants and occupants of the Hot Springs reservation to make contracts concerning their possessory rights, and concerning the title thereto to be acquired by them in the future from the United States. Such contracts are valid as between the parties to the contract."

In Arnold vs. Christy (Ariz.), 33 Pac., 619, the defendant contracted to convey to the plaintiff a certain section of land which he had entered under the Desert Land Act of 1877, as soon as he had obtained patent thereto from the United States and in the event of failure to procure such patent he was to return to the plaintiff $2,500.00 paid him by the plaintiff in advance. The plaintiff sued for the return of his $2,500.00. The lower court held the contract to have been illegal and void, as against public policy,—it relating to public lands of the United States, and contemplating, by its terms, a violation of the laws in relation thereto. The Supreme Court of Arizona, reversing the decision, said:

"It must be conceded that any contract which contemplates some act on the part of either party which is prohibited by the statutes of the United States, or which necessarily implies some fraud upon the government, in the procurement of its lands, must be held void as against public policy; and under the familiar rule that courts will not enforce any part of an illegal contract, known and understood to be such by the parties thereto, money advanced under such an agreement can not be recovered. It was shown by the evidence in this case that the contract above set forth had reference to a section of land held under the desert land act of 1877. The first question to be determined is, then: May an agreement be lawfully entered into, by one holding a desert land entry, to convey title to the same when patent shall have been obtained? The desert

land act of 1877 contains nothing which, in express terms, can be construed as directly prohibiting such agreements.

* * * * * * * * *

"We are unable to see wherein the contract in question, by its terms, contemplated any violation of any of the provisions of the desert land laws as to the requirement necessary to obtain title, or restricting the quantity of land which may be acquired by any one person under it, nor any violation of any ruling of the land department which has the effect of law. The charge of the court below that the plaintiff could not recover for the reason that the contract was illegal and void, was, therefore, in our opinion, error; and for this reason the judgment is reversed, and the cause remanded for a new trial."

For similar decisions see:

McKennon vs. Winn, 1 Okla., 327.
Snow vs. Flannery, 10 Iowa, 318, 323-4.
Lipscomb vs. Nichols, 6 Colo., 290, 294.
Fideler vs. Norton (Dak.), 30 N. W., 128, 135-6.

If it had been the purpose of congress to attain the object contended for by the government in the cases at bar, it would have declared the lands entered under the timber and stone act to have been inalienable until a patent was granted and would have required of the applicant, at the time he made his final proof, an affidavit similar to the one required upon making the application to purchase, viz.: "that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the Government of the United States should inure, in whole or in part, to the benefit of any person except himself." Instead of this, the timber and stone act leaves the applicant to purchase free to contract to sell the land applied for after the application to purchase is made and the provisions of section 2 of the act have been complied with, and in doing so he has done nothing inconsistent with the provisions of the law upon the subject. Myers vs. Croft, 13 Wall., 291, 296-7.

The acts charged against the defendants as comprising and making up the scope, extent and form of the alleged criminal

conspiracy to defraud the United States, are not prohibited by the timber and stone act, and such prohibition can not be read into that act by construction; it follows that such acts can not be charged to be in violation of the statute and therefore illegal and criminal for the purpose of constituting the fraud denounced by section 5440. Wherein do such acts involve moral turpitude, or a base, corrupt or malevolent purpose; wherein has the United States, in the manner alleged in the indictments, been "deprived or divested of any property, money or other thing otherwise than as the law requires or allows"? The indictments do not charge that the several applicants were disqualified as such when their applications to purchase and sworn "written statements" were made and filed, nor that, when such applications to purchase were made, they had outstanding contracts of sale, or were then acting under agreements or for hire for the defendants or The New Mexico Lumber Company. Neither indictment challenges or denies a full, literal or strict compliance, in letter or in spirit, with the timber and stone act by the applicants prior to and at the time of the applications to purchase. The government, in bringing these indictments to this court, must urge this court to fix a time other than that found in the timber and stone act, prior to which the applicant to purchase may not and can not contract to sell the lands which he hopes to thereafter acquire.

In the search after fraud, under the indictments, the inquiry must be limited to such matters as the statute requires to be established in making the final proof.

The opinion in Adams vs. Church, 193 U. S., 510, 515-17, is here most pertinent. The entry there had been made under the timber culture act. The similarity between the timber culture act and the timber and stone act on the point under discussion is most striking. The entryman must be a citizen of the United States and the head of a family or over twenty-one years of age; the land to be entered must be devoid of timber; the applicant must take oath that the entry is made for the cultivation of timber for the exclusive use and benefit of the applicant; that the application is made in good faith and not for the purpose of speculation, or directly or indirectly for the use

or benefit of any other person or persons whomsoever, etc. The act further provides that eight years must elapse from the day of the entry before final certificate or patent may issue, and the applicant is further required before patent to prove by two credible witnesses that he has planted and for eight years has cultivated and protected the required quantity and character of trees. But in the timber culture act, as in the timber and stone act, the requirement was not reimposed that the entryman, upon making his final proof, must make affidavit that he did not make his entry for the purpose of speculation, or for the use or benefit, directly or indirectly, of any person except himself. The rules and regulations of the land office, however, required a like affidavit on final proof to the one required by the statute on application to enter. In the case cited the entryman who had complied with the statute in making his application had between the date of the application and the making of final proof contracted to sell an interest in the lands upon the issuance of the patent therefor, and the question was whether such an agreement was valid. Holding that there was no prohibition in the Timber Culture Act against such an alienation, the court says:

"There is no requirement in the latter act that the entryman shall make oath that he has not alienated any interest in the land. The policy of the government to require such affidavit when it intends to make it a condition precedent to granting a title was indicated in the homestead act, and could readily have been pursued by a similar provision in the timber culture act if it was intended to extend the principle to that statute. The final proof under the latter act has in view sworn testimony that the number of trees required has been planted, and the prairies theretofore barren of timber have been supplied with trees to the extent required by the law before the title shall pass from the government. The policy of the homestead act, no less than the specific statement in the final oath, looks to a holding for a term of years by an actual settler with a view to acquiring a home for himself. In encouragement of such settlers, and none others, homesteads have been freely granted by the government.

"This conclusion is in conformity with the decisions of the land department in Sims vs. Bruce, 4 L. D., 309, and United

States vs. Read, 5 L. D., 313. In these cases the right of the timber culture entryman to dispose of his holding, acquired by him in good faith, before the final certificate, is fully recognized. It is argued that, conceding these decisions to hold that such entryman can sell his claim after entry and before final proof, it does not follow that he can sell it and agree to prove up the entry claim and obtain a patent with a promise to convey it to another, without violating the policy of the law. But as the law does not require affidavit before final certificate that no interest in the land has been sold, we perceive no reason why such contract, as was found to exist by the Supreme Court of Oregon, would vitiate the agreement to convey after the certificate is granted and the patent issued. If the entryman has complied with the statute and made the entry in good faith, in accordance with the terms of the law and the oath required of him upon making such entry, and has done nothing inconsistent with the terms of the law, we find nothing in the fact that, during his term of occupancy, he has agreed to convey an interest to be conveyed after patent issued, which will defeat his claim and forfeit the right acquired by planting the trees and complying with the terms of the law. Had congress intended such result to follow from the alienation of an interest after entry in good faith it would have so declared in the law. Myers vs. Croft, 13 Wall., 291.

"To sustain the contentions of the plaintiff in error would be to incorporate by judicial decision a prohibition against the alienation of an interest in the lands, not found in the statute or required by the policy of the law upon the subject."

In Williamson vs. U. S., 28 Sup. Ct. Rep., 163, 177, the following is said of the government's endeavor to distinguish Adams vs. Church and its applicability to cases arising under the timber and stone act:

"It is elaborately insisted, on behalf of the government, that there is a difference between the timber culture act and the timber and stone act, resulting from the fact that in the one case in the interim between the entry and the final proof a long time must elapse and much is required to be done by the applicant, while in the other a short time intervenes and substantially nothing is required to be done. But this reasoning, in effect, assails the wisdom of congress in omitting the requirement in the act under consideration, and affords no ground for inserting in the act requirements which congress

has, by express intendment, excluded therefrom. Besides, the weakness of the argument becomes apparent when it is borne in mind that the timber and stone act and the timber culture act were enacted by the same congress and with only a few days' interval between the two."

In Williamson vs. U. S., the defendants were indicted for conspiracy to commit an offense against the United States, to wit, subornation of perjury, in proceedings for the purchase of public lands under the timber and stone act, and this court held that the omission in the timber and stone act of any reiteration in section 3 of the requirement of section 2 regarding a speculative purpose on the part of the applicant, his bona fides and his intent to acquire the land for himself alone is equivalent to an express declaration by Congress that these requirements shall not be exacted at the final hearing.

The reasoning of the court in reaching the conclusion above stated in part is as follows:

"It becomes necessary to determine whether the statute requires an applicant, after he had made his preliminary sworn statement concerning the bona fides of his application and the absence of any contract or agreement in respect to the title, to additionally swear to such facts after notice of his application has been published and the time has arrived for final action on the application. And this, of course, involves deciding whether the regulation of the commissioner exacting such additional statement at the time of final hearing is valid. The inquiry concerns only the second and third sections of the act. Turning to the second section, it will be seen that it requires the applicant to make a sworn statement, giving many particulars concerning the land—its unfitness for cultivation; its being uninhabited; the absence of mineral, etc., etc.,—followed by the requirement that the applicant shall declare that he makes the application, not for the purpose of speculation, but in good faith, and that he intends to appropriate the land to his own exclusive use and benefit, and that no agreement has been made, directly or indirectly, with any person or persons whatsoever by which the title to be acquired from the government shall inure, in whole or in part, to any person except the applicant. And the section concludes by causing any false statement made in the sworn application to constitute the crime of perjury. Examining the third section, it will be seen that it provides

that upon the filing of said statement, as provided in the second section, it shall be the duty of the local land officer to post a notice of the application in his office for sixty days, to furnish the applicant with a copy of such notice for publication, at the expense of the applicant, in the nearest newspaper for sixty days, and when such period has expired, on proof of the publication and of certain facts which the statute expressly enumerates, the applicant shall, upon payment of the requisite charge, in the absence of a contest, be entitled to a patent for the land. Examining the items which the statute requires the applicant to make proof of after showing publication, it is apparent that while some of the things referred to in the prior section, and which are required to be stated in the preliminary proof, are reiterated, all requirement is omitted of any statement regarding a speculative purpose on the part of the applicant, his bona fides, and his intention to acquire for himself alone. When the context of the statute is thus brought into view, we are of the opinion that it can not possibly be held, without making by judicial legislation a new law, that the statute exacts from the applicant a reiteration, at the final hearing, of the declaration concerning his purpose in acquiring title to the land, since to do so would be to construe the statute as including in the final hearing that which the very terms of the statute manifest was intended to be excluded therefrom. We say this, because, as the third section re-exacts in the final application a reiteration of some of the requirements concerning the character of the land made necessary in the first application, and omits the requirements as to the bona fides, etc., of the applicant, it follows, under the elementary rule that the inclusion of one is the exclusion of the other, that the re-exacting of a portion only of the requirements was equivalent to an express declaration by congress that the remaining requirements should not be exacted at the final proof. And this becomes particularly cogent when the briefness of the act is considered, when the propinquity of the two provisions is borne in mind—a propinquity which excludes the conception that the legislative mind could possibly have overlooked in one section the provisions of a section immediately preceding—especially when in the last section some of the requirements of the prior section are re-expressed and made applicable to the final statement. Indeed, we can not perceive how, under the statute, if an applicant has in good faith complied with the requirements of the second section of the act, and, pending the publication of notice, has contracted to convey, after patent, his rights in the land, his so doing could operate to forfeit his right. These conclu-

sions are directly sustained by a recent ruling in Adams vs. Church, 193 U. S., 510; 48 L. Ed., 769; 24 Sup. Ct. Rep., 512, construing the timber culture act."

"The elementary rule that the inclusion of one is the exclusion of the other," referred to by the court, is familiarly known as the maxim "expressio unius est exclusio alterius," and is fully discussed in

Sutherland's Statutory Construction, Secs. 325-329.
Lewis' Sutherland Statutory Construction, Secs. 491-495.
Sedgwick on Construction, page 31, note.
Endlich on Interpretation of Statutes, Secs. 397-399.
Black on Interpretation of Laws, pages 146-149.
Broom's Legal Maxims (8th Ed.), pages 652-669.
Bishop on Written Laws, Sec. 249.
19 Cyc., page 23.

This honorable court then discusses and quotes from Adams vs. Church, supra., and continuing, says:

"It remains only to consider whether it was within the power of the commissioner of the general land office to enact rules and regulations by which an entryman would be compelled to do that at the final hearing which the act of congress must be considered as having expressly excluded, in order thereby to deprive the entryman of a right which the act by necessary implication conferred upon him. To state the question is to answer it. As observed in Adams vs. Church (page 517): 'To sustain the contentions * * * would be to incorporate * * * a prohibition against the alienation of an interest in the lands, not found in the statute or required by the policy of the law upon the subject.' True it is that in the concluding portion of section 3 of the timber and stone act it is provided that 'effect shall be given to the foregoing provisions of this act by regulations to be prescribed by the commissioner of the general land office.' But this power must, in the nature of things, be construed as authorizing the commissioner of the general land office to adopt rules and regulations for the enforcement of the statute and can not be held to have authorized him, by such an exercise of power, to virtually adopt rules and regulations destructive of rights which congress had con-

ferred. As, then, there was no requirement concerning the making in the final proof of an affidavit as to the particulars referred to, and *as the entryman who had complied with the preliminary requirements was under no obligation to make such an affidavit, and had full power to dispose ad interim of his claim upon the final issue of patent*, we think the motive of the applicant at the time of the final proof was irrelevant, even under the broad rule which we have previously in this case applied, and therefore that error was committed not alone in instructing the jury that the indictment covered or could cover the procurement of perjury in connection with the final proof, and that the jury might base a conviction thereon, but in admitting the final proof as evidence tending to show the alleged illegal purpose in the primary application for the purchase of the lands."

In the light of this recent decision of this court, decided shortly after the indictments in the cases at bar were held bad and quashed, there can be but one conclusion—viz: That the indictments in the cases at bar do not charge a criminal offense.

XI.

CERTAIN RULES OF CRIMINAL PLEADING VIOLATED.

It is submitted that the indictments violate the rules of criminal pleading, in connection with the pleading of certain "overt acts," wherein documents referred to by the title, "Testimony of Claimant," are alleged to have been induced and procured to be executed and verified by the defendants Freeman and Nossaman.

(Record, No. 627, pages 3-7.)

(Record, No. 628, pages 3-5.)

The rule is thus stated in Baker vs. State, 14 Tex. App., 332, 337:

"As a general rule, whenever an instrument in writing enters into an offense as a part or basis thereof, or when its proper construction is material, the instrument should be set out in the indictment."

In United States vs. Watson, 17 Fed., 145, the charge was conspiracy, under section 5440, to commit a crime against the United States. In charging the overt act, as in the cases at bar, the indictment referred to a certain written document without setting the same forth in *haec verba;* the court, holding the indictment insufficient by reason thereof, said:

"By all rules of pleading, criminal as well as civil, when a written document is relied on to sustain the prosecution or plaintiff's case, it must be set out either *verbatim* or in substance, and not a statement of the opinion of the pleader as to the effect it was intended to or might produce. The information does not undertake to give the substance of the document mentioned, but only its effect. I am of opinion that this is not sufficient, especially in a criminal charge."

See, also,

1 Bishop's New Crim. Procedure, section 332, subdivision 4.

Pooler vs. U. S., 127 Fed., 509, 517-18.

XII.

THE STATUTE OF LIMITATIONS.

Section 1044, R. S., U. S., as amended in 1876; 19 St. L., 32; 1 Supp. R. S., 98; Comp. St. U. S., 1901, pages 725-26, provides that no person shall be prosecuted, tried or punished for an offense of the character charged in the present indictments, unless the indictment is found "within three years next after such offense shall have been committed."

U. S. vs. Hirsch, 100 U. S., 33, 36.

As section 1045 provides that this limitation shall not apply to any person "fleeing from justice," and as it has been held that an indictment need not allege that any defendant is or has been "fleeing from justice," courts have said that this matter of limitation can not be raised by demurrer. But, with

a formal admission of record of this fact that the defendants have not been, and are not, fleeing from justice, it would seem that a court might well avoid the expense of a jury trial by considering the question on demurrer, and this was so ruled in

U. S. vs. Owen, 32 Fed., 534.

In the present cases it appears by verification that the defendants have at no time been fugitives from justice, and this was conceded by the district attorney.

(Record, No. 627, pages 39, 40 and 41.)
(Record, No. 628, pages 30 and 31.)

No question can be raised by reason of the repeated decisions of the Supreme Court of the United States as to what constitutes the crime provided for by section 5440.

"The gist of the offense is the conspiracy.

"If the conspiracy was entered into * * * the crime was *then complete.*"

Dealy vs. U. S., 152 U. S., 539, 547.

"But in a charge of conspiracy, the conspiracy is the gist of the crime."

Williamson vs. U. S., 28 Sup. Ct. Rep., 163, 171.

"The confederacy to commit the offense is the gist of the criminality."

Pettibone vs. U. S., 148 U. S., 196, 202.

"The gravamen of the offense is the conspiracy."

U. S. vs. Hirsch, 100 U. S., 33.

"This offense does not consist of both conspiracy and the acts done to effect the object of the conspiracy, but of the conspiracy alone."

U. S. vs. Britton, 108 U. S., 199.

"Indeed, the offense is a completed one when the conspiracy is established, and an overt act committed in pursuance of that conspiracy, notwithstanding the ultimate object may not be accomplished."

Olson vs. U. S., 133 Fed., 849, 855.

If there were no judicial authority to guide us, a mere reading of section 5440, R. S., would seem irresistibly to lead to the conclusion that when,

(a) "Two or more parties conspire" to do that which the statute defines, and
(b) "One or more of such parties do any act to effect the object of the conspiracy,"

those persons would then be liable to indictment, and, on conviction, to the penalty specified in the statute, without reference to what might thereafter be done in the matter. In other words, it would seem that the "offense" defined by that section would then "have been committed" within the meaning of section 1044, R. S., and that the following language of a distinguished jurist would be applicable to the case:

"There is in this but one offense. When it is committed, the party is guilty and is subject to criminal prosecution, and from that time, also, the statute of limitations applicable to the offense begins to run."

U. S. vs. Irvine, 98 U. S., 450, 452.

In the Irvine case the alleged offense consisted in withholding money which, if withheld at all, had certainly been continously so withheld up to the time of finding the indictment, so that the allegations of the indictments now under consideration as to the continuous character of the alleged conspiracy would have applied as well in that case.

In Hyde v. Shine, 199 U. S., 62, 76, this court held that the offense is complete when an overt act is performed:

"Granting that the gravamen of the offense is the conspiracy, and that at common law it was neither necessary to aver nor prove an overt act, Rex vs. Gill, 2 B. & Ald., 204; Bannon vs. United States, 156 U. S., 464, 468, an overt act is necessary under Rev. Stat., section 5440, to complete the offense."

In both of the indictments now before us, the conspiracy is alleged to have been formed in or before the year 1901, and

overt acts are said to have been committed in each case within the year when the conspiracy is said to have been formed, and more than five years before these indictments were found. Therefore, the "offense" defined by section 5440, if committed at all, was so "committed" in 1899 or 1901, and no indictment was "found" until 1907. If the foregoing reasoning be sound, as was held by three District Courts, the offense was barred in each case at the time the indictment was found.

U. S. vs. Owen, 32 Fed., 534 (D. Ore. 11-7-87).

U. S. vs. McCord, 72 Fed., 159 (W. D. Wis. 11-26-95).

Ex Parte Black, 147 Fed., 832, 841 (E. D. Wis. 7-27-06).

We believe this is the logical and true conclusion, and that it is justified and sustained by the expression of the Supreme Court in U. S. vs. Irvine, supra.

There is, however, judicial authority upon the very question herein involved, being no less authority than that of this Honorable Court. In U. S. vs. Hirsch, 100 U. S., 33, certified to this court from the Circuit Court of the United States for the Southern District of New York, it appears that an indictment consisting of four counts was found, February 3, 1877, against Hiram Hirsch and others, who pleaded that the offenses therein charged had been committed more than three years before the finding of the indictment.

The first count was drawn under section 5440 of the Revised Statutes and charged the defendants with a conspiracy, entered into on the first day of September, 1873, to defraud the United States out of certain importation duties.

The second count charged a conspiracy under section 5440, entered into on the 13th day of September, 1873, to similarly defraud the United States. The remaining counts were drawn under section 5445 and charged that the defendants, knowingly and fraudulently effected an entry of the goods at the custom-house.

The United States demurred to the defendants' pleas of the Statute of Limitations, and the judges of the Circuit Court,

being divided in opinion upon the question whether section 1044 (the three-year Statute of Limitations) or section 1046 (the five-year Statute of Limitations) was applicable, certified the question to the Supreme Court. This court held "that the plea of the Statute of Limitations of three years is good in bar of the first two counts of the indictment," and in the course of its opinion said:

"The gravamen of the offense here is the conspiracy. For this there must be more than one person engaged. Although by the statute something more than the common law definition of a conspiracy is necessary to complete the offense, to wit, some act done to effect the object of the conspiracy, it remains true that the combination of minds in an unlawful purpose is the foundation of the offense and that a party who did not join in the previous conspiracy *can not*, under this section, *be convicted on the overt act*."

These authorities are clearly applicable and conclusive upon this subject. We have been advised that representatives of the government in the court below opposed this view and claim that it is in conflict with Ware vs. U. S. 154, Fed. 577. Of course if in conflict with the authorities we have cited it must give way.

On the point we are now considering the court says (154 Fed., 579) that the following question is presented for decision:

"Where the conspiracy was formed and an overt act was done in pursuance of it more than three years prior to the indictment, and overt acts were subsequently done in the execution of it within the three years, may one of the conspirators be successfully prosecuted for it?"

After citing many cases the court proceeds thus:

"After a careful reading and consideration of these and other authorities, our conclusions are that the true answer to this question is that the existence of the conspiracy and the conscious participation of the defendant therein within the three years are indispensable to the maintenance of such prosecution, but that, if the facts are established by competent evidence, such a prosecution may be sustained. Proof of *the formation* by defendant and others, more than three years before the indictment, of such a conspiracy as that charged in the

indictment, *under which an overt act has been done prior to the three years*, is insufficient to sustain the charge of a conspiracy within the three years. But in connection with evidence aliunde of the existence of the same conspiracy, and of the defendant's conscious participation therein within the three years, it is competent evidence for the consideration of the jury in determining the issue presented by the indictment. An overt act committed by one of the alleged conspirators within the three years, pursuant to a conspiracy between him and the defendant, formed and followed by an overt act more than three years prior to the filing of the indictment, without the defendant's consent or agreement, within the three years to the continued existence and to the execution of the conspiracy, is incompetent to establish its existence and his participation therein within the three years.

"The offense under section 5440 is the conspiracy, not the conspiracy and the overt act. 'The provision of the statute,' says the Supreme Court, 'that there must be an act done to effect the object of the conspiracy, merely affords a *locus penitentiae*, so that before the act done either one or all of the parties may abandon their design and thus avoid the penalty prescribed by the statute.' U. S. vs. Britton, 108 U. S., 199, 205; 2 Sup. Ct., 525; 27 L. Ed., 703. So that there is a locus penitentiae after the performance of each overt act and a presumption of the innocence of the defendant, and if, after the performance of the first overt act, a defendant abandons the design of the conspiracy, and the prosecution of the conspiracy and of the first overt act becomes barred by the statute, the overt acts of other conspirators within the three years in the performance of the old conspiracy without the conscious participation of the defendant ought not to charge, and can not charge, him with the offense, because they fail to evidence his intent to violate the law within the three years."

It appearing, in both of the indictments now under consideration, that the alleged conspiracies were formed in or before the year 1901, and that the requisite and alleged overt acts were committed in each case within the year in which the conspiracy is said to have been formed, and more than five years before these indictments were found, it would seem, giving the most unfavorable construction for the defendants to the rule laid down in the Ware case, that, in neither indictment, is any crime charged as having been committed within three years of the finding of the indictment. "It is conceded,"

says Judge Phillips, "that the commission of the first overt act in furtherance of the conspiracy agreement put into operation the three years' statute of limitations."

Ware vs. U. S., 154 Fed., 577, 586.

If, as the government seems to contend, the offense charged is a continuing one, then, it having been charged in these indictments that the conspiracy was formed, in one case in 1899, and in the other in 1901, and that overt acts in each instance were committed within the year of forming the conspiracy, prosecution for said conspiracy must have been barred, if the conspiracy charged, which is sought to be prosecuted, is the original conspiracy. If it is not a continuing offense, as we contend, and if the prosecutor intends to say that he has charged an offense within the three years, we reply that, stripped of the legal conclusion that said conspiracy continued from the date of its formation to the finding of the indictment, there is no allegation of any conspiracy within the three years, nor is there any allegation of any date within the three years, when any such conspiracy is said to have been formed or renewed by the conscious participation therein of the defendants.

It has been well said that the charging part of the indictment can not be aided by a resort to the overt acts. If the government contends that the allegation of overt acts within the three years continues, revives, or, in itself, renews, the original conspiracy, then the statement in the Ware case, that there is a time for repentance after each overt act, is of no force or effect, and the mere allegation of an overt act within the three years would be given the force and effect of alleging that at that date the parties agreed and conspired together as well as that they performed the particular act. Certainly, no such doctrine as this can be maintained.

The foregoing contention as to the bar of the statute applies alike to all of the defendants named in both indictments now under consideration.

It is contended on the part of the government that this was a so-called continuing crime. What fact or feature is there here to bring this case within such a classification? Here the conspiracy charged was confined to the single undertaking of

obtaining indirectly the title to certain definitely described lands and completed within a year. No effort is made in the indictments to enlarge the original conspiracy to embrace any other lands obtained within the three years.

The situation presented by the facts alleged in the indictments is identical with the situation in the Ware case with reference to the McKibben entry. If the conspiracy which the defendant Ware was charged with having been a party to in the Ware case had been the procurement of the fraudulent McKibben entry, together with the allegation of the performance of an overt act with reference to the McKibben land within the statutory period, the analogy would be complete. And yet the Circuit Court of Appeals held "that a prosecution for that conspiracy and act was barred by the statute of limitations" (page 578). Ware was indicted for having conspired within the statutory period to defraud the United States by obtaining the title, possession and use of other government land by fraudulent homestead entries, and the evidence of the prior and barred conspiracy with reference to the McKibben entry was held admissable, as tending to prove the fraudulent intent of the conspirators. So in the cases at bar—under the decision of the Circuit Court of Appeals—the alleged conspiracies charged are barred, just as the prosecution of the McKibben conspiracy. The formation of the McKibben conspiracy and the performance of an overt act thereunder set in operation the statute of limitations, and the performance subsequent to the completion and consummation of the objects of that conspiracy of an act in relation to the lands so obtained would no more toll the statute of limitations in the one case than in the other. To bring the defendants within the rule of the Ware case the indictments should have charged a conspiracy within the three years to obtain certain lands, and at the trial, in proving the conspiracy alleged, evidence of other like conspiracies between the defendants in former years would be admissible in proof of the fraudulent motives of the defendants in making the conspiracy charged.

The bar of the statute of limitations is a defense, not of grace, but of right; not contingent, but absolute and vested. It

is an indefeasible defense acquired, and not the hope of one. The language of the statute is that no person shall be prosecuted, tried or punished for an offense of the character charged in these indictments unless the indictment is found "within three years next after such offense shall have been committed." The statute of limitations then commences to run, or, at least, from the performance of the first overt act thereunder, and prosecution is barred unless the indictment be found "within three years next after such offense shall have been committed."

In Moore vs. State, 43 New Jersey Law, 203, 208-9, the subject under discussion was before the court. The opinion of the court, in part, upon this topic, is as follows:

"Before committing any offense, the citizen had a natural and absolute right to life and liberty. By his offense the state acquired the right to deprive him of life or of liberty to the extent prescribed by the violated law. The citizen remained in possession of life and liberty, but his possession was liable to be disturbed by means of a prosecution to be instituted by the state according to law. His offense, however, was local, and subjected his possessions to impairment only within the jurisdiction whose laws he had broken. In these respects, the relation between the offender and the state corresponds to that between one having the possession of land without the right of possession and one entitled to invade that possession by action at law. In both cases there is a right of suit which must be pursued, if at all, within and under the laws of a single jurisdiction, and in both cases the wrongdoer holds a possession which only such legal prosecution can take away.

"In view of this position of things, the statute of limitation declares that no person shall be prosecuted, tried or punished for an offense unless the indictment be found within two years after the crime. This, in effect, enacts that when the specified period shall have arrived the right of the state to prosecute shall be gone, and the liability of the offender to be punished,—to be deprived of his liberty,—shall cease. Its terms not only strike down the right of action which the state had acquired by the offense, but also remove the flaw which the crime had created in the offender's title to liberty. In this respect, its language goes deeper than statutes barring civil remedies usually do. They expressly take away only the rem-

edy by suit, and that inferentially is held to abate the right which such remedy would enforce, and perfect the title which such remedy would invade; but this statute is aimed directly at the very right which the state has against the offender, the right to punish, at the only liability which the offender has incurred, and declares that this right and this liability are at an end. Corresponding provisions in a statute concerning lands would undoubtedly be held to extinguish every vestige of right in him who had not asserted his claim, and to perfect the title of the possessor. Giving them the same force regarding crimes, they annihilate the state's power to punish, and restore the offender's rights to their original *status.*"

Statutes of limitations are statutes of repose, and should be liberally construed in favor of the person invoking the benefit thereof. This is true in civil cases, and, for obvious reasons, is especially true in criminal prosecutions.

Cases in which the Supreme Court of the United States has expressed itself to this effect are—

Wood vs. Carpenter, 101 U. S., 135, 139;

Pillow vs. Roberts, 13 How., 472, 477;

McCluney vs. Silliman, 3 Peters, 270, 278;

Willison vs. Watkins, 3 Peters, 43, 54;

Leffingwell vs. Warren, 2 Black (U. S.), 559, 606.

Whenever the alleged crime has reached the point where an indictment may be found necessarily the crime has been committed, and eo instanti the statute of limitations begins to run.

Without going farther into this matter, we would suggest some other and particular reasons why the offenses attempted to be charged in the indictments under consideration are barred by the statute of limitations as to all of the defendants.

In the Ware case the court found sufficient evidence to show that Ware had consciously participated in the conspiracy within three years, but, in the present cases, it is plain that such conscious participation on the part of the defendants is not alleged. This is clearly evident in the indictment in No. 628. It charges a conspiracy on August 25, 1899, to do various acts, the latest of which was that one William Barth was to

convey some lands to The New Mexico Lumber Company. This conveyance, whenever made, was absolutely the end of the conspiracy, the termination of the fraud, after giving the indictment the benefit of all possible presumptions and conjectures.

The indictment then charges that defendant Freeman committed seven overt acts, at dates in 1899, the latest in October of that year. It is only by inference and unwarranted presumption, not at all by allegation, that the conscious participation of Biggs, McPhee and McGinnity in these acts is shown, but, for present purposes, it is not important to discuss this point.

Then the indictment says that defendants McPhee and McGinnity procured from Barth a deed to The New Mexico Lumber Company, which expressly declares that it is made to correct some error in a former deed, made on June 1, 1900, more than seven years before the finding of this indictment on June 22, 1907. This makes it obvious that the last possible act which defendants Biggs and Freeman are alleged to have conspired to do was at least supposed to have been done more than three years before the finding of the indictment, and there is not a word which, by the most violent presumption, shows that either Biggs or Freeman ever discovered the error thus corrected or, in the slightest degree, participated in the procurement of the correction deed, or even knew, or had notice, of its procurement. Nothing in these indictments, or either of them, alleges that any of the defendants had the slightest connection with, or interest in, The New Mexico Lumber Company, and the absence of such allegations surely prevents the existence of even a presumption that either of these parties, after having secured a conveyance from Barth, in 1900, ever became aware of any defect therein which required correction. We are aware that presumptions and conjectures can never take the place of allegations in a criminal case, but here there is neither allegation nor conjecture to show the guilt of Biggs or Freeman within the three years next before the finding of the indictment. It, therefore, seems clear that their demurrer to this indictment should be sustained without further argument.

If it be suggested that the indictment not only alleges the conspiracy on August 25, 1899, but also on every date alleged for an overt act, and continuously up to the date of the indictment, we answer that the conspiracy is the real offense.

"This offense does not consist of both the conspiracy and the acts done to effect the object of the conspiracy, but of the conspiracy alone." U. S. vs. Britton, 108 U. S., 188, 204, and the conspiracy must necessarily precede every act done to effect its object. "The date of the conspiracy is alleged, and that the overt act was 'according to and in pursuance of,' necessarily, therefore, was subsequent to the conspiracy." Dealy vs. U. S., 152 U. S., 546; 14 S. C. R., 680, 685.

As this indictment charges the earliest overt act to have been done on August 25, 1899, the conspiracy was necessarily formed before that act, and then completed and committed, though, possibly, as alleged, on the same day. Hence, the other allegations as to the date of the conspiracy must necessarily be restricted, as indicated in the Ware case, to "conscious participation" in later overt acts, and this, as we have said, is not even hinted at in this indictment so far as defendants Biggs and Freeman are concerned, nor save by strained and unwarranted inference from the confirmation or correction deed by any one.

Now, as to the defendants McPhee and McGinnity: The only possible act or participation in the alleged conspiracy charged against these defendants within the three years prior to the finding of the indictment, is that the defendants procured one William Barth to execute to The New Mexico Lumber Company a quit claim deed for certain lands described in the paragraphs of the indictment entitled "Overt Acts," which deed recites:

"This deed is given as correction for deed made June 1, 1900."

Thus we have it appearing on the face of the instrument itself that the alleged conspiracy was not only formed, but finally consummated prior to June 1, 1900, something like seven years prior to the finding of this indictment, unless it shall further appear upon consideration of the indictment that this correction deed, which is pleaded, had some *efficacy*, was

of some import in revivor of or carrying out or committing the alleged conspiracy. Certainly nothing in the indictment shows that this deed was in any way necessary; that it accomplished anything; what, if anything, it corrected, nor does it even negative the fact that the deed of June 1, 1900, finally vested the title to all of these lands in The New Mexico Lumber Company, and thereby consummated and concluded everything for which the conspiracy is alleged to have been formed. So far as the allegations in the indictment are concerned, this deed may have been given to correct one which failed to state the true consideration; which had an error as to the names or designation of some of the parties or their residence, or there may have been some slight defect in the form of the acknowledgment appended to the original deed. Certainly the statute cannot be tolled in this manner. Certainly there is nothing in the execution of this deed which in any manner would indicate that it was a step in the consummation of the alleged conspiracy or necessary to warrant an indictment or set in operation the statute of limitations. The rules in reference to the construction of criminal statutes and of criminal pleadings have been so fully presented in other parts of this brief and are so repeatedly before the court that it is hardly proper to call the court's attention to the fact that the pleader can not successfully charge the defendant with a criminal offense where it is necessary to resort in the construction of his indictment to inference and argument to make out a crime.

The language of the court in Ex Parte Black, supra, may here be appropriately quoted:

"Judge Bunn, in United States vs. McCord (D. C.), 72 Fed., 159, says: 'I have no doubt that the statute of limitations has stood in the way of this prosecution from the first, and that counsel for the government have felt the difficulty.' This language seems to fit the case at bar, and to explain some eccentricities of the pleader. * * * To escape this dilemma (of the statute of limitations) the pleader has been driven to skillful fencing and adroit expedients."

We have in this argument assumed that the making of the correction deed, as well as the original deed of Barth, was an overt act within the meaning of the term, and have sought to

demonstrate that even if that assumption were correct, the offense attempted to be charged against Biggs and Freeman was barred by the statute. This assumption, however, is not justified under the law. The offense was in every detail, and as to every element, committed within the meaning of the statute, when the conspiracy was entered into and the first or any overt act performed for its consummation.

Thereupon the defendant was subject to indictment, the government's cause of action, speaking in the language of the civil law, was complete, and by universal principle the statute of limitations began to run and operate.

Assuming now, for the sake of argument, that the pleader has charged an offense in these indictments, that offense must be a conspiracy to defraud the United States in the procurement of the lands indirectly, which it is said The New Mexico Lumber Company could not obtain directly.

Granting this, then the offense must have been not only committed, but completed, when the title of the lands passed from the government. When this correction deed was made, one of two things was true—either the title had already passed, or it had not. If it had passed, the fraud was complete; if it had not, then the deed accomplished nothing.

An overt act, within the meaning of the law, must be an act tending to effect the objects of the conspiracy.

Ware vs. U. S., 154 Fed., 577, 579.

U. S. vs. Britton, 108 U. S., 205.

Ex Parte Black, 147 Fed., 832.

U. S. vs. Brace, 149 Fed., 874.

U. S. vs. Black, 160 Fed., 431, 435.

In neither of the alternatives assumed did the making of the correction deed, or, in fact, the original deed, tend to accomplish the objects of the conspiracy. With this conceded, there is nothing left in the indictment which, by the broadest assumption, would amount to the charge of any offense within the period of three years.

The principles here contended for have received the approval of judicial adjudication. The language of the statute

should not be lost sight of; if two or more persons conspire, "and one or more of such parties do *any act* to *effect the object* of the conspiracy," they all are liable to the pains and penalties provided for therein.

In Ex Parte Black, 147 Fed., 832, 840, the court said:

"An overt act presupposes a pending conspiracy. So that the act of any one done in furtherance of the conspiracy may bind all of his associates. When a conspiracy has been completely effected, this implied agency disappears. Logan vs. United States, 144 U. S., 263; 12 Sup. Ct., 617; 36 L. Ed., 429; Brown vs. United States, 150 U. S., 93; 14 Sup. Ct., 37; 37 L. Ed., 1010. It is a contradiction of terms to speak of an act done *to effect the purpose* of the conspiracy *after the conspiracy has been accomplished.* Such an anomalous doctrine might prolong a conspiracy, and would keep it in active operation until every obligation incurred during the formative period of the plot had been liquidated. In United States vs. Donau, 11 Blatchf., 168 Fed. Cas. No. 14,983, the function of an overt act is declared to be 'to show that the unlawful combination became a living, active combination.' I believe no case can be found where the overt act post-dated the consummation of the conspiracy. Where would be the locus penitentiae in such a case? So that, whether you consider the subject-matter of the alleged overt act or its date, weeks after the conspiracy had been completed, the indictment discloses a desperate effort on the part of the pleader to confuse the distinction of the law, and to resuscitate a cause of action which, presumably, through the neglect of some one, had been allowed to lapse."

In U. S. vs. Black, 160 Fed., 431, it has been held that acts performed by the alleged conspirators after the consummation of the conspiracy to defraud, though perhaps connected with it, are not "acts to effect the object of the conspiracy," cannot be pleaded as overt acts for that purpose and evidence thereof is not admissible for the purpose of proving such overt acts, if alleged. In that case it appears that payments by the conspirators for services in making false applications to purchase, etc., were not made until after the entries had been made under the Timber and Stone Act and certificates of purchase had been issued by the Land Office, such payments being made in settlement for pre-existing services. The acts of making such

payments had been pleaded by the government as overt acts "to effect the object of the conspiracy" and by the pleading of such overt acts the government endeavored to toll and escape from the statute of limitations.

The District Court held (Ex Parte Black, supra) that the cause of action could not be resuscitated nor the statute of limitations tolled by the pleadings of an overt act which "post-dated the consummation of the conspiracy."

On appeal to the Circuit Court of Appeals for the Seventh Circuit, the lower court's ruling was affirmed, the court saying:

"Whatever may appear from the indictment as the relation of these payments and of the payees to the alleged conspiracy, the proof of the fact and date of completion of entries and issuance of certificates of purchase establishes beyond controversy that each payment was made not as an 'act to effect the object of the conspiracy,' nor to procure services to that end, but in settlement or payment for a pre-existing service or obligation; that such service was necessarily completed and the obligation incurred prior to the date of the last certificate of purchase, March 17, 1903; so that neither fact nor date of the payment so made can serve as an overt act for charging conspiracy under section 5440, and thus evade the above mentioned limitation. Assuming that such payment may be provable in support of the charge, it can not be received by way of direct proof, as an act in the execution of the conspiracy, but as circumstantial evidence tending to show, either the fact of conspiracy or some of the participants therein. The facts that final entries were made and purchases certified are presumptive, if not decisive, under the terms of the statutory provisions therefor, known as the 'Stone and Timber Act,' that all proceedings or service required to be performed to that end, by either and all of the parties named as conspirators or payees, had been entirely performed, when these certificates of purchase were issued, in so far as concerns the conspiracy to defraud the United States. If the appellees were engaged, as alleged, in a fraudulent conspiracy for that object, and procured the services and action of the several entrymen and the commissioner named as payees, respectively, each had then committed and completed every act, fraudulent or otherwise, to accomplish the entries and complete purchases as designed—inclusive, as of course, of the alleged engagement and service for which these subsequent payments were made. Thereafter no occasion remained for further action on the part either of the conspirators or other persons engaged

to effect that object; and no opportunity was open to either conspirator for immunity under the locus penitentiae provision of section 5440. Whether settlements between the conspirators or with agents, for profits or services in the conspiracy, were then or subsequently made, or were refused, are facts of no materiality for the operation of either statute—section 5440 or 1044.

"We are of opinion, therefore, that any violation of section 5440 was committed and completed before the certificates of purchase were issued, and that no overt act is charged within the period limited by section 1044, however the averments of the indictment are considered.

"The contention that the object of the conspiracy was not completed until a patent was issued and delivered is untenable, as we believe, in any view of the effect of the final entries and certificates of purchase thereunder, for the two-fold reasons, that violation of the statute (a) in nowise depends upon the success of the conspiracy, and (b) became complete (as before stated) when the final step was taken on the part of the conspirators. What course has been or may be adopted by the land office or other departments in reference to these entries, or in issuing or withholding the formal patents thereupon, is plainly immaterial under this indictment. The general doctrine in reference to public lands subject to entry appears to be settled, that a tract 'ceases to be subject to the disposal of the United States' when it is entered, paid for, and so certified by the land office, although no patent has been delivered."

Testimony at a trial, in proof of the alleged performance by McPhee and McGinnity of the alleged overt act of obtaining from Barth the correction deed would be inadmissible.

3 Greenleaf on Evidence, section 94, pages 101-2, is as follows:

"Sec. 94. Declarations and Acts of Co-conspirators.—The *principle* on which the *acts and declarations of other conspirators,* and acts done at different times, are admitted in evidence against the persons prosecuted, is that, by the act of conspiring together, the conspirators have jointly assumed to themselves, as a body, the attribute of individuality, so far as regards the prosecution of the common design; thus rendering whatever is done or said by any one, in furtherance of that design, a part of the *res gestae,* and, therefore, the act of all. It is the same principle of identity with each other that governs in regard to the acts and admissions of agents when offered in

evidence against their principals, and of partners, as against the partnership, which has already been considered. And here, also, as in those cases, *the evidence of what was said and done by the other conspirators must be limited to their acts and declarations made and done while the conspiracy was pending, and in furtherance of the design;* what was said or done by them before or afterwards not being within the principle of admissibility."

In U. S. vs. Logan, 144 U. S., 263, 309; 36 L. Ed., 429, 445, the court says:

"Doubtless, in all cases of conspiracy, the act of one conspirator in the prosecution of the enterprise is considered the act of all, and is evidence against all. United States vs. Gooding, 25 U. S.; 12 Wheat., 460, 469 (6:693, 696). *But only those acts and declarations are admissible, under this rule, which are done and made while the conspiracy is pending, and in furtherance of its object.* After the conspiracy has come to an end, whether by success or by failure, the admissions of one conspirator, by way of narrative of past facts, are not admissible in evidence against the others."

In Brown vs. U. S., 150 U. S., 93, 98; 37 L. Ed., 1010, 1013, the court said:

"In the admission of the statements and declarations of Mrs. Hitchcock the court assumed that the acts and declarations of one co-conspirator, after the completion or abandonment of a criminal enterprise, constituted proof against the defendant of the existence of the conspiracy. This is not a sound proposition of law."

In People vs. Kief, 126 N. Y., 661, 662, the New York Court of Appeals announces the law relating to the admission of statements of the alleged conspirators, in the following language:

"If the guilt of one of several defendants, who are jointly indicted for a felony, is sought to be established by evidence showing, or tending to show, a conspiracy between him and the other defendants for the commission of the felonious act, evidence as to acts or statements of the others must be confined to such as were made or done at times when the proofs in the case permit of a belief that a conspiracy existed, and when, therefore, the acts or statements might have been in furtherance

of the common design. Whatever may have been said or done by the several persons accused of conspiring to commit the crime before the time when, according to the evidence, the conspiracy was formed, or subsequent to the time when the conspiracy terminated, by the accomplishment of the common purpose, or by abandonment, is inadmissible as evidence against the others."

In People vs. Parker, 67 Mich. 222; 34 N. W. 720, 723, the court says:

"The theory of the prosecution was that Van Alstine, Cleveland and Parker conspired together to commit the crime, and that the acts and declarations of each in the pursuance of the common purpose was evidence against all, whether in their presence or not. This is true where the acts and declarations sought to be given in evidence are confined to the time intervening between the beginning and ending of the conspiracy. What was said or done by one of the conspirators before the conspiracy was formed, or after its object had been obtained, or its work fully completed, not in the presence or hearing of the others, and not brought to their knowledge and ratified by them, is not admissible against them or either of them."

See also—

Wiborg vs. U. S., 163 U. S., 632, 657.

American Fur. Co. vs. U. S., 2 Pet., 358, 365.

Wright and Carson on Criminal Conspiracies, page 128.

8 Cyc. 680-1.

6 Ency. Law (2nd Ed.), 869.

If it be true that the acts and declarations of one conspirator, occurring after the consummation of the conspiracy, are not admissible against the other conspirators, how can the act of one conspirator, occurring after the completion of the conspiracy, be pleaded as an overt act, and, by such palpable device, thus bring the crime of a barred conspiracy within the statutory period?

In the indictment in No. 627 in an endeavor to toll the statute of limitations, all three defendants are alleged to have procured the issuance of eleven patents by the United States on May 5, 1905.

While there are many laws of the United States under which scrip is issued, with which timber lands may lawfully be entered, the only act under which such timber land may be entered and which, in any manner, attempts to restrict the quantity which may be entered by one entryman is the Timber and Stone Act of June 3, 1878. Section 3 of this act provides that, when certain proofs are presented and payment made, "the applicant *may* be permitted to enter said tract," but then adds that, when the papers are transmitted to the General Land Office, "a patent *shall* issue thereon." This change of language in the statute certainly makes all discretionary matters end when the entry is "permitted" and the issuance of patent is imperative and is a mere ministerial act to be performed by the department after entry. And this was held in

Jones vs. U. S., 35 Fed., 561, 562.

Montgomery vs. U. S., 36 Fed., 4-6.

"When the tract, which was subject to entry, was thus purchased and paid for, it ceased to be subject to the disposal of the United States; it was not in equity their property. * * * The legal title, it is true, was retained by them, but they held it as trustee for the benefit of the purchaser; and they were bound upon proper application to issue to him a patent therefor."

Cornelius vs. Kessel, 128 U. S., 456, 460.

See also—

U. S. vs. Detroit Timber & Lumber Co., 26 Sup. Ct., R. 283, 286-7.

That the two cases first above cited were reversed (131 U. S., 1-19) does not affect this conclusion, the reversal being solely on the ground that jurisdiction to try such matters against the United States had not been conferred on the Circuit Courts.

It would seem, therefore, that these allegations, as to procuring the issuance of patents, can not be relied on as showing the continuance of the alleged conspiracy, and this leaves this

indictment, like the other one, without a word to indicate that Biggs or Freeman ever had any "conscious participation" in the alleged conspiracy after August 12, 1901, which is more than three years before the finding of the indictment.

As to Nossaman, he is charged with having, within the three years, and after the date of the issuance of the patents, secured two of the entrymen to execute deeds conveying certain of the lands described to The New Mexico Lumber Company; but we have already seen that the title having passed from the government, the fraud, if any, was an accomplished fact, and the securing of such deeds could not be resorted to as overt acts to prevent the running of the statute. These acts performed at a subsequent date could accomplish nothing in the way of effecting the purpose of the alleged conspirators to defraud the government, and certainly there is no law, or even departmental regulation, that makes it an offense for any citizen to secure the making of a deed from some other citizen to The New Mexico Lumber Company.

United States vs. Black, 160 Fed., 431, supra.

In both of the indictments here under consideration it is alleged that the conspiracy was formed for the purpose of securing indirectly from the United States government an amount of land in excess of that which The New Mexico Lumber Company could, under the laws of the United States, obtain directly—the amount in No. 627 being fixed as 1,760 acres, and in No. 628 as 1,117 acres. It is then alleged that the descriptions of the lands mentioned in each indictment are set forth in overt acts numbered 1 to 11, inclusive, and in overt acts numbered 1 to 7, inclusive, respectively. Upon turning to the overt acts thus mentioned in the indictments, we find the lands described as promised, and that in each instance said overt acts alleged consist in securing entrymen to execute and verify what is denominated "Testimony of Claimant," which, under any reading of the Timber and Stone Act, which is relied upon by the government, must mean what is commonly designated as the final proof of entry of the land which is made at the time of the purchase, and which, when made, secures for the entrymen the final receiver's receipt.

Under this state of facts, we contend that the statute of limitations has run as to all of the defendants named in both of the cases, for, in the first indictment, the date of the conspiracy is fixed as March 30, 1901, and all of the overt acts in regard to the making of final proof are laid within one year. So that, as to each and every tract of land which it was charged the conspirators were to secure from the government, an overt act had been committed to such an extent as to practically divest the government of its equitable title at least five years before the finding of the indictment; and in No. 628 overt acts as to each tract of land were charged as having taken place within the year 1899, and were of the same character as those mentioned in No. 627. It follows that, in any view of the law, the conspiracies had been formed and an act committed to effect the object of the conspiracies from six to seven years before the finding of the indictment, and, at the time of the commission of these overt acts mentioned in each of the indictments, the defendants stood in the position where, under the law, they could be indicted, prosecuted and convicted if the evidence bore out the allegations of the indictment and the indictments stated a crime. This being the case, the statute must necessarily have run, under the authority of U. S. vs. Irvine, 98 U. S., 450, and U. S. vs. Hirsch, 100 U. S., 33; and this is also true under the authority of the Ware case, and under all rules of reason and logic.

XIII.

If the contention and argument, supported both by logic and by Ex parte Black, supra, and U. S. vs. Black, supra, is sustained by this court, and it is held that in U. S. vs. Biggs, et al. (No. 628), the so-called overt act No. 8 (Record, pages 6 and 7) was not an "act to effect the object of the conspiracy," and was improperly pleaded as such, the consummation and completion of the alleged conspiracy having occurred long prior thereto; and in U. S. vs. Freeman, et al. (No. 627), it is similarly held that the so-called overt acts 12 to 24, inclusive (Rec-

ord, pages 7 to 12), were not acts tending to effect the object of the alleged conspiracy and were improperly pleaded as such, the completion of the alleged conspiracy having occurred long prior thereto; then it must follow that the indictments each fail to charge a criminal offense. Section 5440 requires a conspiracy and an "act to effect the object of the conspiracy." If neither indictment pleads an "act to effect the object of the conspiracy," then the indictments fail to charge an offense; until an "act to effect the object of the conspiracy" is performed there is no liability. The indictments in charging a conspiracy and failing to charge an overt act would nullify the *locus penitentiae* provision of section 5440, otherwise.

In the charging portion of the indictments, the scope of the conspiracy is thus defined: The defendants were to solicit and procure the entrymen to pay to the receiver of the land office the price fixed by law for the lands, make entries thereon, secure patents therefor, and convey the titles so obtained to the corporation or to Barth. (Record, page 2.)

The date and time when the entrymen were so to be solicited and procured to do the specified acts outlined above are not fixed by either indictment; but since "no man is presumed to do wrong or to violate the law, and every man is presumed to know the law" (U. S. vs. Budd, 144 U. S., 154, 163), and since "there is no rule of law better established than where, from a given state of facts, two opposite inferences may be drawn, that inference will be adopted which is lawful and honest, and not that which is unlawful and dishonest" (U. S. vs. Detroit T. & L. Co., 124 Fed., 393, 400), it must be presumed, and that presumption must be held controlling, since "in a criminal case doubt must be resolved in favor of the accused" (Williamson vs. U. S., 28 Sup. Ct. Rep., 163, 175), that the defendants were to and did, if at all, solicit and procure the entrymen to do the acts and things specified in the charging part of the indictments *after and not before* each entryman had made his final proof as required by the timber and stone act of the due publication of his notice of application to purchase, and of the unoccupied, unimproved and non-mineral character of the land, and *after and not before* each entryman had been examined, had testified

and had given the sworn testimony of the non-speculative and exclusive use and benefit character of his purchase, as required, so we are informed, by the unpleaded regulations of the land office.

Turning now to the allegations of the overt acts, the so-called overt acts 1 to 11, inclusive, in the indictment in U. S. vs. Freeman (No. 627), and 1 to 7, inclusive, in the indictment in U. S. vs. Biggs (No. 628), being all the so-called overt acts remaining in each indictment undisposed of, each relates to acts outside the scope of the conspiracy, and which on the face of the indictments in no way tended to effect the purposes of the conspiracies charged.

In each of said overt acts it is alleged that one of the conspirators procured a certain entryman named to "execute and verify by his oath before the said register a certain document in the form prescribed by law and entitled 'Testimony of Claimant.'"

The statute requires the overt act to be an "act to effect the object of the conspiracy," and yet, overt acts are here charged which have no relation to the conspiracies charged. How can the overt acts in question be held to be acts "to effect the object of the conspiracy," when the very allegations of the indictments themselves show that the alleged conspiracies contemplated agreements with the entrymen after the final proof and sworn "Testimony of Claimant" had been made? In the case of a conspiracy so charged and entered into, to accomplish the very definitely enumerated steps for the procurement indirectly of certain lands, set out with so much detail in the indictments, the procuring and soliciting of entrymen to make and execute the documents referred to as "Testimony of Claimant" can have no connection nor be "in pursuance of the said unlawful, corrupt, wicked and malicious conspiracy, combination, confederation and agreement."

It follows that each indictment fails to charge an "act to effect the object of the conspiracy," and that for this added reason no criminal offense is charged therein.

XIV.

ONE OR SEVERAL CONSPIRACIES.

If the overt acts were a part of the offense of conspiracy to defraud, then every time an overt act in pursuance of the conspiracy was performed, the offense might be said to have been repeated and in that sense to be a renewed, different or continuing one; but the overt acts have repeatedly been declared not to be a part of the offense (U. S. vs. Britton and other cases cited); and if they are not a part of the offense, they cannot be, in and of themselves, considered as continuing or repeating or renewing, if this were possible, the offense which is complete and which became ripe for prosecution when the first overt act was performed.

While at common law the union of minds to accomplish a purpose criminal, or by criminal means to accomplish a lawful purpose, was punishable without an overt act in pursuance thereof, under the statute, although the conspiracy still remains the gist of the offense, the overt act is essential before prosecution is attempted.

Whenever any one of the conspirators performs an act to effect the purpose of the conspiracy, all who have not withdrawn therefrom may be punished. How, then, can an act which may be done by any one of the conspirators and which is no part of the offense itself, be said to be a renewal of the offense, to be a re-conspiring. The statute contemplates no such theory. No man can conspire with himself. If the rule of the Ware case is reverted to, to the effect that every overt act of one conspirator, with "conscious participation" by the other conspirators, works a renewal of the conspiracy, and should be held to be the law, our reply is that "conscious participation" by the defendants other than the one alleged to have performed this act is not charged or attempted to be charged.

The indictments, it is true, allege that the defendants on a certain day in March, 1901, in the one case, and in August, 1899, in the other, and "at the several times of the committing of the several overt acts hereafter in this indictment mentioned, and continuously at all times" between said dates when

said conspiracies were formed, and "the day of the presenting of this indictment" conspired (Record, page 1); but the allegations of the overt acts fail to support any such conclusion of law or sweeping flourish of the pleader.

If, however, for the sake of the argument, the allegation of the indictments is accepted that the defendants conspired "at the several times of the committing of the several overt acts hereafter in this indictment mentioned," then on each of the dates of the several overt acts the defendants are charged to have then and there conspired to do the wicked thing set forth in the indictments.

In other words, if the language of the indictment is accepted, on March 30th (overt act 1, page 3), April 9th (overt acts 2 and 3, page 3), June 18th (overt acts 4 and 5, page 4), August 7th (overt acts 6 and 7, page 5), August 8th (overt act 8, page 6), August 10th (overt act 9, page 6), August 12th, (overt acts 10 and 11, pages 6 and 7), 1901, May 5th, 1905 (overt acts 12-22 inclusive, pages 7 to 10), and February 19th, 1907 (overt acts 23 and 24, pages 10 and 11), respectively, in United States vs. Freeman et al. (No. 627), and August 25th (overt act 1, page 3), August 26th (overt acts 2 and 3, page 3), August 26th (overt acts 2 and 3, page 3), October 11th (overt acts 4, 5, 6 and 7, pages 4 and 5), 1899, and May 15th, 1906 (overt act 8, page 6), in United States vs. Biggs et al. (No. 628), the defendants entered into the conspiracy, or rather conspiracies charged. If that be the true construction of the indictments they are then duplicitous, as held by Judge Lewis in the opinion rendered in the court below. Commonwealth v. Bartilson, 85 Pa. St. 482, 487. But if each indictment charges but one conspiracy, entered into on the day first named, which construction of the indictments must be adopted since every doubt is to be resolved in favor of the accused (Williamson vs. United States, supra), prosecution of that conspiracy, if the contention herein made is sustained, has been barred by the statute of limitations.

While in the end it must be held that the indictments each charge but one conspiracy, in order that the rule of doubt may be applied, yet the uncertainty as to whether the pleader in-

tended to charge several conspiracies, thereby rendering the indictments duplicitous, or but one conspiracy, renders the indictments bad. As stated by Judge Lewis, "If we take the first view, the charge is duplicitous, and if the second, prosecution of the offense is barred. The dilemma renders the indictment bad." U. S. vs. Biggs, 157 Fed., 264, 274.

For this further reason the ruling of the lower court should be sustained.

XV.

CRITICISM OF ARGUMENT AND AUTHORITIES RELIED UPON IN COURT BELOW ON THE STATUTE OF LIMITATIONS.

Counsel for the defendants at the time of the preparation of this brief have not been furnished with a copy of the brief of the United States and hence are unable to directly reply thereto. Assuming as in this situation we must that the argument and authorities cited will be of the same general nature as those presented upon the argument of the demurrers in the court below, the following is respectfully submitted in criticism of and answer to said line of argument and said authorities.

On general principles it would seem quite certain that the statute of limitations in relation to any crime would begin to run at the time when the crime was so far complete that the criminal could be successfully prosecuted therefor. In homicide, it dates from the death of the victim, for the actual death is essential to that crime, but in embezzlement it dates from the act and not from the time when it is detected.

12 Cyc., page 255; VIII., C. 1.

The illustrations given in this work show clearly that the mere fact that a crime is not detected does not prevent the running of the statute of limitations, and, indeed, the very words of the statute,

R. S. U. S., section 1044, as amended in 1876,
19 St. L., chapter 56, pages 32-3,
1 Comp. St. 1901, pages 725-6

make the limitation begin when the "offense shall have been *committed*," and a crime is certainly "committed" when it is complete, so that the offender might be prosecuted if detected.

U. S. vs. Hirsch, 100 U. S., 33.
Hyde vs. Shine, 199 U. S., 62, 76.

It is, however, also apparently settled that where a crime is what is called a "continuing" crime, "where some portion of the crime is within the period although another portion is not," the statute bar does not take effect while the crime so continues.

12 Cyc., page 256; VIII., C. 2

The authority just cited thus illustrates this point:

"Thus a prosecution for obstructing a public road may be begun after the statutory period has elapsed, subsequent to the erection of the obstruction, if it still exists within the period of limitations prior to the indictment. The rule also applies to bigamous cohabitation, and according to some of the cases to conspiracy where it continues. It has been held, however, that the crime of withholding pension money, under a statute, is not a continuous one, but is complete on a refusal to pay on demand; and that the crime of deserting one's wife is not a continuous one, but is to be regarded as having been committed when the defendant left his wife."

Examining these illustrations with care, it would seem that the true underlying principle is that when the crime consists not merely of some single act, but rather of a series of acts, each of which is, in and of itself, separately a complete crime, in such case the statute does not bar a prosecution for the later act, though a prosecution for the former act be barred. For example (and this example well illustrates the fallacies of a case hereafter to be cited), if a man should commit a series of robberies or murders, it would require no argument to show that a statute bar against prosecution of the first would not affect a prosecution for the latest. So when a highway is obstructed, it is not the erection of the fence which constitutes the crime, it is the obstruction to travel, the maintenance or continuance thereof, which offense is as effectually "committed"

years after the erection, as on the day thereof. Hence, the later offense is not barred, though the former may be. So as to bigamy. As shown in the authority we have cited, bigamy committed when the marriage to the second wife is performed and continuance of cohabitation does not prevent the running of the statute, but when, as in State vs. Sloan, 55 Iowa, 21; 7 N. W., 516, and In Re Snow, 120 U. S., 274, the statute specially made the future cohabitation a substantive crime in itself, then each day's cohabitation became a distinct crime in itself, and hence not barred by a bar of a previous crime.

So in the case of United States vs. Irvine, 98 U. S., 450-3, the Supreme Court of the United States held that the crime of withholding pension money from the party entitled thereto was but a single offense, and was not continuous, that its nature was such that it was not repeated day by day. The court says: (98 U. S., page 452.)

"But whatever this may be which constitutes the criminal act of withholding, it is a thing which must be capable of proof to a jury, and which, when it once exists, renders the party liable to indictment.

"There is in this but one offense. When it is committed, the party is guilty and is subject to criminal prosecution, and from that time, also, the Statute of Limitations applicable to the offense begins to run. * * *

"He pleads the statute of two years, a statute which was made for such a case as this; but the reply is, You received the money. You have continued to withhold it these twenty years; every year, every month, every day, was a withholding, within the meaning of the statute.

"We do not so construe the act. Whenever the act or series of acts necessary to constitute a criminal withholding of the money have transpired, the crime is complete, and from that day the Statute of Limitations begins to run against the prosecution."

This seems to us to apply in full force to the crime of conspiracy, notwithstanding the confusion of ideas which appears to influence some courts.

A brief excursion into and survey of the history of criminal conspiracies may not only prove interesting but of value

in this connection and in ascertaining the spirit in which a prosecution for conspiracy is to be approached.

From Encyclopaedia Britannica, 9th Ed., Vol. VI., page 262, the following is taken:

"In the early period of the law, down to the 17th century, conspiracy was defined by the Ordinance of Conspirators of the 33 Edward I.:—'Conspirators be they that do confedr or bind themselves by oath, covenant, or other alliance, and every of them shall aid the other falsely and maliciously to indite, or cause to indite, or falsely to move or maintain pleas, and also such as cause children within age to appeal men of felony, where they are imprisoned and sore grieved, and such as retain men in the country with liveries or fees to maintain their malicious enterprises, and this extendeth as well to the takers as to the givers.' The offense aimed at here is conspiracy to indict or to maintain suits falsely; and it was held that a conspiracy under the Act was not complete, unless some suit had been maintained or some person had been falsely indicted and acquitted. A doctrine, however, grew up that the agreement was in itself criminal, although the conspiracy was not actually completed. (Poulterer's case, 1611.) This developed into the rule that any agreement to commit a crime might be prosecuted as a conspiracy. A still further development of this doctrine is that a combination might be criminal, although the object apart from combination would not be criminal. The cases bearing on this question will be found arranged under the following heads, and in chronological order, in the *Law of Criminal Conspiracies and Agreements*, by R. S. Wright (London, 1873):—Combinations against government, combinations to defeat or pervert justice, combinations against public morals or decency, combination to defraud, combination to injure otherwise than by fraud, trade combinations. '*It is conceived*,' says the author, '*that on a review of all the decisions, there is a great preponderance of authority in favor of the proposition that, as a rule, an agreement or combination is not criminal unless it be for acts or omissions (whether as ends or means) which would be criminal apart from agreement.*' A dictum of Lord Denman's is often quoted as applying a definition of conspiracy. It is, he says, either a combination to procure an unlawful object, or to procure a lawful object by unlawful means; but the exact meaning to be given to the word 'lawful' in this antithesis has nowhere been precisely stated. A thing may be unlawful in the sense that the law will not aid it, although it may not expressly punish it. The extreme limit of

the doctrine is reached in the suggestion that a combination to hiss an actor at a theatre is a punishable conspiracy."

In History of the Criminal Law of England, Stephen, Vol. II., pages 227-9, it is said:

"Conspiracy has much analogy to an attempt to commit a crime. It consists in an agreement between two or more persons (as is commonly said) 'to do an unlawful act or to do a lawful act by unlawful means.' In other words, it is an agreement to do anything unlawful, whether the thing agreed upon is in itself an ultimate object, or only a means to an end lawful or unlawful.

"The crime of conspiracy, regarded as an inchoate offense, calls for little observation, but it has a remarkable history. In very early times the word had a completely different meaning from that which we attach to it. This appears from two early statutes. The first is the *Articuli super Chartas* (28 Edw., 1, A. D. 1300), which was intended to supplement and enforce Magna Charta. The tenth chapter begins: 'In right of conspirators, false informers, and evil procurers of dozens, assizes, inquests and juries, the king has provided remedy for the plaintiffs by a writ of chancery. And notwithstanding he willeth that his justices of the one bench and of the other, and justices assigned to take assizes, when they come into the country to do their office shall upon every plaint made unto them award inquests thereupon without writ, and shall do right unto the plaintiffs without delay.'

"In the 33 Edw., 1 (1304), there is a definition of conspirators: 'Conspirators be they who do confeder or bind themselves by oath, covenant, or other alliance, that every of them shall aid and bear the other falsely and maliciously to indict or cause to indict, or falsely to move or maintain pleas; and also such as cause children within age to appeal men of felony whereby they are imprisoned and sore grieved; and such as retain men in the country with liveries or fees to maintain their malicious enterprises; and this extendeth as well to the takers as to the givers; and stewards and bailiffs of great lords which by their signory office or power undertake to bear and maintain quarrels, pleas or debates that concern other parties than such as touch the estates of their lords or themselves.'

"The earliest meaning of conspiracy was thus a combination to carry on legal proceedings in a vexatious or improper way, and the writ of conspiracy, and the power given by the *Articuli super Chartas* to proceed without such a writ, were the forerunners of our modern actions for malicious prosecu-

tion. Originally, therefore, conspiracy was rather a particular kind of civil injury than a substantive crime, but like many other civil injuries it was also punishable on indictment, at the suit of the kind, and upon a conviction the offender was liable to an extremely severe punishment which was called 'the villain judgment.' The Star Chamber first treated conspiracies to commit crimes or indeed to do anything unlawful as substantive offenses, and after the Restoration this amongst other doctrines of theirs found its way into the Court of King's Bench. The doctrine was expressed so widely or loosely, that it became in course of time a head of law of great importance, and capable of almost indefinite extension. In various cases the definition that a conspiracy is an agreement to do an unlawful act was held to mean something more than an agreement to do an act which is in itself criminal when done by a single person, the word 'unlawful' being used in a sense closely approaching to immoral simply, and amounting at least to immoral and at the same time injurious to the public. The length to which this doctrine has been carried even in our own days with respect, especially to conspiracies in restraint of trade, and conspiracies to compel employers of labor to submit to terms imposed upon them by persons in their employment is well known, but upon this and some other adaptations of the law of conspiracy I defer my observations until I come to the particular conspiracies which have been treated as substantive crimes."

In Pollock and Maitland's History of English Law, Vol. II., p. 537-8, it is said:

"Wrongful prosecution may be regarded as an aggravated form of defamation. It is a wrong of which ancient law speaks fiercely. In England before the Conquest one might lose one's tongue or have to redeem it with one's full *wer* if one brought a false and scandalous accusation. Probably the law only wanted to punish the accuser who made a charge which he knew to be false; but it had little power of distinguishing the pardonable mistake from the wicked lie, and there was a strong feeling that men should not make charges that they could not prove. Roman influence would not tend to weaken this feeling. The law of the later empire required that any one bringing a criminal charge should bind himself to suffer in case of failure the penalty that he had endeavoured to call down upon his adversary. So soon as our judicial records begin, we see that an amercement is inflicted upon every unsuccessful plain-

tiff *pro falso clamore suo*, whatever may have been the cause of his failure. In the appeal of felony the appellor, vanquished in battle, still pays the old *wite* of sixty shillings to the king. For a time, however, appeals were being encouraged, and we may see an appellor excused from punishment *quia pugnavit pro Rege*. Under Edward I. the tide turned, and a statute decreed that if the appellee was acquitted, his accuser should lie in prison for a year and pay damages by way of recompense for the imprisonment and infamy that he had brought upon the innocent. This statute is a typical piece of mediaeval legislation. It desires to punish malicious appeals; it actually punishes every appeal that ends in an acquittal. Even before this statute an acquitted appellee may have had an action against his accuser. A few years later it was necessary to invent the writ of conspiracy for use against those who were abusing the new process of indictment. In time past the offense of false judgment had been often placed beside that of false accusation; but even in Edgar's day the doomsman could free himself from punishment by swearing that he knew no better doom than that which he had pronounced. By slow degrees the charge of false judgment became a means of bringing the decisions of the inferior courts before the supreme tribunal; it ceased to import moral blame, though it would lead to an amercement or in some cases the suppression of a 'liberty.'"

Conspiracy is a crime of itself. It is not the crime or fraud which the parties conspire to commit. At common law, no overt act is essential to a conviction for conspiracy,

8 Cyc. 624, II, B. 3.

and a conspirator who withdrew before the commission of any overt act remained liable to conviction for the conspiracy.

8 Cyc. page 643, II, C. 6.

The only material difference between the common-law crime of conspiracy, as defined in

8 Cyc. page 623 et post

and the crime created by Sec. 5440 of R. S. U. S. is thus stated by the highest authority in the case of

U. S. vs. Britton, 108 U. S. 199, 204.

"The offense charged in the counts of this indictment is a conspiracy. This offense does not consist of both the conspiracy and the acts done to effect the object of the conspiracy, but of

the conspiracy alone. The provision of the statute, that there must be an act done to effect the object of the conspiracy, merely affords a *locus penitentiae*, so that before the act done either one or all of the parties may abandon their design, and thus avoid the penalty prescribed by the statute."

This often quoted and often misconstrued passage has never been overruled or seriously questioned and remains as an authoritative statement of the law on this subject. The conspiracy still remains the offense, and the accomplishment of the unlawful purpose is not an essential element.

8 Cyc., pages 625-6, II, B. 4.

While an overt act is essential, it need only be "an act to effect the object of the conspiracy."

Sec. 5440, R. S. U. S.

This is not necessarily, or by any fair inference, the final act which fully accomplishes the unlawful object of the conspiracy, but is the first of a series of acts by which that unlawful object is sought to be effected. When that act is performed, the crime is committed—the "locus penitentiae" has been passed—and the future withdrawal of a conspirator, though before the final accomplishment of the purpose, while it might relieve him from whatever may be the legal consequence of the unlawful act itself, would certainly leave him liable to indictment and prosecution for the conspiracy.

All this seems axiomatic, so long as one keeps in mind the separate character and nature of the conspiracy itself and the unlawful object to be accomplished by the conspirators.

But when we come to examine some opinions of courts upon the subject, we find that one State court of last resort and several Nisi Prius courts of the United States have seemed to lose sight of these distinctions, apparently in their desire to punish supposed crimes of the character, always reprehensible, always elusive, and at present especially unpopular, commonly called by the vague and all comprehensive name of "graft." Far be it from us to condone or excuse such offenses, but it has well been said that "hard cases make bad precedents" and it is at least a question whether it be wise to tolerate any beginning

of a return to the practices of the period when Scroggs and Jeffreys stretched the law to accomplish the King's will through the forms of legal procedure. Ours is a government of the people, yet there is no tyrant more despotic than a majority uncontrolled by legal bounds, and any student of our constitution knows how important are the functions of an independent judiciary which defines and adheres to the legal boundaries within which remedies must be sought.

Bloomer vs. Todd, 3 Wash. Ter. 612; 19 Pac. 135, 139.

The learned judge who delivered the opinion in Ware vs. U. S., 154 Fed., 577, cities on p. 579, as holding that where a conspiracy was formed and an overt act was done in pursuance thereof more than three years prior to the indictment, and overt acts were subsequently done in the execution of it within the three years, one of the conspirators may be successfully prosecuted, the following cases from State courts:

Commonwealth vs. Bartilson, 85 Pa. St., 482, 488.

People vs. Mather, 4 Wend. (N. Y.) 229, 259; 21 Am. Dec. 122.

American Fire Ins. Co. vs. State, 75 Miss. 24, 35; 22 South, 99, 102.

Ochs vs. People, 25 Ill., App. 379, 414.

S. C. 124 Ill., 399; 16 N. E. 662, 673.

The Mather case, in 4 Wendell, decides nothing in regard to the statute of limitations which could have any possible bearing on our case. The only mention of that statute is on pages 255 et post, where it is conceded that a conspiracy prosecution against an alleged conspirator whom the prosecution desired to use as a witness was barred. But, as to the defendant, the court held (4 Wend. page 260),

"That whenever a new party concurs in the plans originally formed, and comes in to aid in the execution of them, he is from that moment a fellow conspirator. He commits the offense whenever he agrees to become a party to the transaction or does any act in furtherance of the original design."

From this proposition the court draws the conclusion that an error has been committed by the court below in holding that

the fact that the defendant assisted in carrying the conspiracy into execution after its formation would not make him a party to it. But in reaching this conclusion (4 Wend., page 259) the court lays down the following propositions:

That the venue of a crime must be laid in the county where the crime is committed.

That in case of conspiracy the venue may be laid in any county in which it can be proved that an overt act was done.

From these, the judge infers that the crime is committed where the overt act is performed.

As far as place is concerned, this may be correct, and yet it may not apply to time, and is certainly not an authoritative decision as to a question of time. Judge Marcy adds:

"I admit that it is the illegal agreement that constitutes the crime. When that is concluded the crime is perfect, and the conspirators may be convicted if the crime can be proved. No overt act need be shown, or even performed, to authorize a conviction."

But he also regards the conspiracy as renewed whenever an overt act is performed anywhere, and this is doubtless the portion of the opinion relied on as showing the crime of conspiracy to be "continuous" within the rule whereby that character prevents the statute of limitations from barring prosecutions.

But the supposed error was held insufficient to warrant a new trial of Mather, who had been acquitted, and certainly it would now seem not to require any argument to show that one who joins a conspiracy after its formation certainly then commits the crime no matter when the others become guilty.

So, on the point now under consideration, this case is no authority, and its dicta cannot be controlling. At most, they would only sustain a theory that the conspiracy is renewed with each overt act, a theory of which we shall say more hereafter.

American Fire Ins. Co. vs. State, 75 Miss., 24, 35; 22 So., 99, 102, is a case under an anti-trust statute quoted in full at the beginning of the opinion, whose only resemblance to Sec. 5440 of R. S. U. S. is that the statute declares the trust, among

other things, to be a "criminal conspiracy." The court also cites the dictum in People vs. Mather, already referred to, and holds that the true offense, under their trust statute, consists both of the combination and its injurious effect, and that each act of fixing rates amounts to a new offense, or a crime. The opinion strongly sustains the point which we have stated, that what has been called a "continuing" crime is really a repeated crime, new with each day, and therefore a separate crime, and it cites the Pennsylvania case of Com. vs. Bartilson as holding that an indictment, to be sufficient, must charge not only the overt act, but also the conspiracy itself, as within the period of limitation. This ruling alone would be fatal to the indictments in the cases at bar, as both allege a conspiracy and overt acts to effect it long prior to the period of limitation.

But the court goes further and specifically declares (22 So., 103) that authorities cited from the Federal Courts are not in point under the Mississippi statute because of its differing materially from the United States statute and because of the ruling of the Britton case which declares that the overt act is no part of the crime. We conclude, therefore, that the converse proposition must also be true, that this case cannot be authority under the United States statute.

Ochs vs. People, 25 Ill. App., 379, 415, is a case of conspiracy to commit a series of frauds, some of which seem to have been committed within the period of limitation, while others were committed and the original conspiracy was formed before that time. As in the case last cited, and others to be hereafter considered, these frauds, while of like character, were distinct and separate—were not separate steps toward the accomplishment of a single object, but amounted to the accomplishment of separate objects, the acquirement by the conspirators of separate sums of money, and were therefore the commission of distinct offenses. The court says (25 Ill. App., 415):

"The defendants in this case are not indicted for that offense" (the offense of obtaining money under false pretenses supposed to have been the object of the conspiracy), "but for a conspiracy to commit that offense. The offense charged in

the indictment was complete when the conspiracy was formed, and it can not be said that because circumstances intervened which rendered the consummation of the intended crime impossible, the conspiracy itself was not consummated. A conviction for a conspiracy does not depend upon whether the conspiracy has been successful, or whether its objects have been carried out, but merely whether the conspiracy itself has been formed."

The court adopts the view that the crime consists in the existence, not the formation, of the conspiracy, and that whenever an overt act discloses the existence of the conspiracy the conspiracy itself is renewed; though the court limits this by saying (25 Ill. App., 416) "at least as to the person acting."

In the Supreme Court (124 Ill., 399, 16 N. E., 662, 673) there is absolutely no discussion of the law, except the bald statement that when the existence of the conspiracy prior to the period of limitation had been shown, as it was, "it is necessary for the avoidance of the bar of the statute of limitations to inquire whether there were any overt acts in furtherance of of conspiracy committed by the defendants subsequent to that time;" to which the court adds a showing that such acts were so committed.

Commonwealth vs. Bartilson, 85 Pa. St., 482, 488, resembles the case at bar more closely than any other state case or any case in the Circuit Court of Appeals, in that it is, like the cases at bar, a writ of error prosecuted to review a judgment quashing an indictment, and does not involve any review of evidence, but only the sufficiency of the indictment.

The first count of the indictment was, in all material respects, precisely like the indictments now under consideration, charging a conspiracy and some overt acts prior to the period of limitation and later overt acts within that period. And the order quashing this count was affirmed by the Supreme Court.

The court, in part, said (page 486):

"The first assignment alleges error in quashing the first count of the indictment. Said count charged the defendants with a conspiracy to cheat and defraud one O. H. P. McCoy of his moneys, goods, chattels, property and estate. The conspiracy is averred to have been formed on the 20th of December,

1874. This was more than two years prior to the finding of the bill, and upon this ground the court below quashed the count. It was strongly urged, however, that inasmuch as it was averred in said count that the defendants had, in 'pursuance and renewal of said conspiracy,' committed divers overt acts specifically described in said count, the date of one of which at least was within the statutory period, there was a continuance and renewal of the conspiracy from time to time, and the statute was thereby tolled. This is plausible, but unsound. The offense charged was the conspiracy. According to all the authorities the conspiring is the essence of the charge, and if that be proved the defendants may be convicted. Collins vs. The Commonwealth, 3 S. & R., 220; Commonwealth vs. McKisson, 8 Id., 420; Commonwealth vs. Judd, 2 Mass., 329; Commonwealth vs. Tibbetts, Id., 536; Commonwealth vs. Warren, 6 Mass., 74; State vs. Richie, 4 Halstead, 293; State vs. Buchanan, 5 Harr. & Johns., 317; People vs. Mather, 4 Wendell, 229. According to the first count the offense was complete on the 20th day of December, 1874. The overt acts set forth do not constitute the offense. They are the evidence of it, and are sometimes said to be the aggravation of it. An overt act may or may not be unlawful, per se. It is because of its relation to an unlawful combination that it becomes obnoxious to the criminal law. The averment that the conspiracy was 'renewed' from time to time does not meet the difficulty. If it proves anything it proves too much. The 'renewal' of a conspiracy means to begin it again; to recommence it; to repeat it. From this it is apparent that each renewal is a new offense; a repetition, it is true, of a former one, but still an offense for which an indictment would lie. If, therefore, the overt acts were done or committed in renewal of the conspiracy of December 20, 1874, as charged in the count, they aver distinct offenses. It is a well-settled rule of criminal pleading that distinct offenses can not be joined in the same count. This principle is too familiar to need the citation of authority; we will only refer to the latest case: Hutchison vs. The Commonwealth, 1 Norris, 472. The difficulty in regard to this count arises merely from a mistake in pleading. The date of the conspiracy should have been laid within the statutory period. The commonwealth must allege and prove a conspiracy within two years. If this can not be done the commonwealth has no case. The pleader evidently felt the strain of this part of his case when he introduced the averment that the overt acts were in 'renewal' of the original conspiracy. It was practically laying an offense with a continuando; it was an attempt to prove the existence of a crime within the statutory period, by

showing its commission outside of such period, and that it had been continued down to a time within it. In a recent case in which I delivered the judgment of the court (Gise vs. The Commonwealth, 31 P. F. Smith, 428), the doctrine was asserted that there is no such thing as a continuing offense; that it is wholly unknown to the criminal law. This language has been somewhat criticised, in view of which I have reconsidered it carefully, with a view to withdraw or qualify it if found erroneous. Next to being right, nothing would afford me more pleasure than to correct an error. In order to interpret its true meaning the passage must be considered in its connection. The question before us was whether a man who had been indicted in 1876, for bigamy committed in 1868, could be convicted by showing that he had continued the offense during the intervening years by cohabitation with the second woman. It was held that he could not, and that there was no such thing as continuing a completed offense so as to toll the statute. It was not intended to assert the absurd proposition that a man might not repeat an offense from day to day, as in the case of maintaining a nuisance, and other familiar instances which might be referred to. This may be done daily for any indefinite period. But a man could not be convicted of maintaining a nuisance charged to have been committed ten years prior to the finding of the bill of indictment by proving that he had continued the nuisance, day by day, to a time within the statutory period. In the sense, therefore, of tolling the statute it can not be said that a completed offense can be continued. It may be repeated from day to day, but the statute runs from the close of each day, and the indictment must charge the offense to have been committed within the statutory period. This is all that was intended to be said in Gise vs. The Commonwealth; it was all that the language referred to implies when read in connection with the subject-matter to which it refers. In this sense the doctrine of that case is reasserted.

"We think the learned judge of the court below was right in quashing the first count."

In passing on the second count, which had been quashed, not for any error on its face, but solely because a bill of particulars seemed to show that there would be a failure of proof, the Court said that proof not disclosed by that bill of particulars might well appear at the trial, and, while carefully avoiding a point-blank statement that the mere existence of an old conspiracy at the time of the commission of a recent overt act

would be sufficient to sustain a conviction, the court intimates that a finding, by a jury, of an existing conspiracy proved by an overt act might be proper. This rather cautious and limited adoption by this Court of the theory of renewable conspiracies rather strengthens the force of the decision that the first count of the indictment was bad, and makes the case, as a whole, a strong authority in favor of our position in the cases at bar.

In the District Courts of the United States this point has been variously decided. The cases on both sides are cited on page 579 of 154 Fed. Rep. and we will not now attempt to analyze them at length, but will pass to the cases in the Circuit Courts of Appeals decided in 1907 and 1908:

Bradford vs. U. S., 152 Fed., 616, 617 (5th Circuit).

Ware vs. U. S., 154 Fed., 577-593 (8th Circuit).

Jones vs. U. S., 162 Fed., 417, 432 (9th Circuit).

In the Bradford cases the Circuit Court of Appeals merely adopts the opinion of the District Judge in U. S. vs. Bradford, 148 Fed., 413, 430, which is thus practically made the opinion of the Appellate Court. In that opinion (beginning on page 417) the judge demonstrates that under sec. 5440 no prosecution can be maintained until an overt act is committed, and that,

"the moment a conspiracy is formed and an overt act is committed by one of the conspirators to effect the purpose of the conspiracy, that moment the offense can be prosecuted and the statute of limitations begins to run as regards that conspiracy and that particular overt act."

But the judge cannot follow this to the conclusion that if the particular overt act escapes the vigilance of the government detectives for three years, the conspirators might thereafter go on with impunity, being thereafter only liable for the legal consequences of their unlawful acts and not for the conspiracy itself, and, with the courage of his convictions, he adopts the theory that every overt act is proof of a new conspiracy, and that if a defendant were convicted immediately after the first overt act, and again immediately after each succeeding overt act, he could only blame himself for having been

guilty of such a number of conspiracies, citing a Vermont case wherein one was convicted of 307 sales of liquor, and he further relies upon the Mississippi case which we have cited and which, as we have shown, makes a clear distinction between the state statute and that of the United States.

While this may be called the doctrine of renewal gone to seed, it is certainly logical. If it be true that each overt act may be regarded as evidence of and an act in a new conspiracy, or if it be held that the existence, not the formation, of a conspiracy is the true offense, then it necessarily follows that a separate prosecution can be based on each overt act, and if there be 307 overt acts, there may be 307 punishments. This, however, is so startling and unsound a doctrine that some one (on page 430 of 148 Fed.) adds a note that there had been no prosecution based on any earlier overt act; and an examination of the cases will show that in every case wherein this doctrine of renewed conspiracy is put forward, it is so put forward for the purpose of avoiding the "hard case" presented by unpunished crime, prosecution for which is otherwise barred by statute.

In Ware vs. U. S., 154 Fed., 577, 580, the court interprets the decision of this court in the Britton case in 108 U. S., 199, 205, as declaring, not only that one abandoning the conspiracy before the first overt act thus frees himself from prosecution, but also that the same result follows from abandonment after the first, but before any future, overt act. As we have shown, abandonment of the conspiracy after liability has become fixed has never been decided to relieve a conspirator from prosecution—it is only dictum in this case, for Ware was found not to have abandoned the conspiracy—and no such doctrine is hinted at in the Britton case.

But the court then says (154 Fed., 580):

"The offense denounced by section 5440 is not the mere formation, but the existence, of the conspiracy and its execution."

On this premise it is easy to reach the conclusion that each overt act shows a newly "existing" conspiracy, and that if it so exists 307 times, it may be punished as often, though Judge Sanborn does not state this logical conclusion.

But, is this asserted premise correct? Sec. 5440, as far as it can affect this point, is in the following words:

"If two or more persons conspire * * * and one or more of such parties do any act to effect the object of the conspiracy."

This does not say: "if two or more persons ever conspired at some past time" nor does it say: "If a conspiracy between two or more persons exists"—as far as the words of the statute go, they do refer to the formation, not the existence, as far as there is any distinction between the words, and it is only by interpretations of courts anxious lest some offender go "unwhipt of justice" that any other interpretation has been given, either under common law or statute.

Jones vs. U. S., 162 Fed. 417, 426, substantially holds to the same idea, that each overt act proves a renewed or existing conspiracy, though the idea is not so clearly expressed as in many cases, and the judge seems involved in much confusion of ideas. He cites, as in point, an opinion of his own writing in 64 Cal., 293, in a case wherein the point now under discussion was not even remotely involved, the prosecution having been for murder and conspiracy only appearing in connection with the evidential value of declarations and acts of co-conspirators. These might well enough be admitted on a prosecution for an accomplished crime, without reference to whether or not a prosecution for the conspiracy was barred. The judge then puts the supposititious case of a conspiracy to commit a series of murders and asks whether, after one murder had been committed, there would be "any sound sense in holding that no other or further crime had been committed" if a second murder were perpetrated. To this question there could be but one answer—most certainly another crime has been committed, a murder, but not the particular crime of conspiracy. As in the case he cites from 64 Cal., the crime is murder in such case. But this question exposes another of the fallacies which underlies all this reasoning in alleged land fraud cases. The legal remedy for accomplished land frauds is a recovery back of the land by the United States and the forfeiture of the money paid therefor,

together with prosecutions for perjury or subornation of perjury in case of some of the parties.

See

Section 2 of the Timber and Stone Act, 20 St., 89.
2 U. S. Comp. St., page 1546.

But these penalties, provided by the law-making power, do not seem satisfactory and the courts are importuned by the very powers that created them to find some other or additional remedy for the supposed wrongs.

And thereupon the court, in Jones vs. U. S., cites the Ware case and the other cases which we have considered, and falls into line with the theory of "existing" or "repeated" conspiracies, a theory wholly artificial and most certainly contrary to actual facts, leading inevitably to the conclusion that for a single actual conspiracy one may be prosecuted as often as an overt act is performed and because of that act.

The illustrations used in this case, however, suggest a still further distinction, which may or may not be well founded, but which is certainly as plausible as the theory we have been considering.

If A, B and C conspire fraudulently to enter 307 tracts of land, and carry out that intent by making the 307 entries, scattering them over a period of say ten years; and if it be found that all but seven of those entries were completed more than three years before prosecution, the conspiracy, in every case, necessarily preceding the entry, as shown in Dealy vs. U. S., 152 U. S., 539, 546, on the theory we are considering there are only seven conspiracies for which a prosecution will lie; does even this ruling cover a case wherein the conspiracy only related to one entry, but the execution involved several steps? To illustrate by one of the indictments now under consideration: Biggs, Freeman, McPhee and McGinnity are said to have conspired to procure the entry of certain specified lands, and their conveyance to one Barth, who was to convey them to The New Mexico Lumber Company. The final proofs are said to have all been made in 1899 or possibly 1900. The only overt act charged as having occurred within three years next before the finding of the

indictment is not some other fraudulent entry to effectuate the conspiracy, but the procurement of a deed from Barth avowed to correct errors in a deed made in 1900. Is this proof of renewed conspiracy? Suppose all the conspirators had been indicted and punished in 1901, as they surely might have been if there is truth in the indictment. Would there be any reason in freshly indicting them for that same old conspiracy to procure that same land? We hardly think that the judge who wrote the opinion in the Bradford case would say so, and we are confident that no other court has so decided.

U. S. vs. Owen, 32 Fed., 534.

U. S. vs. McCord, 72 Fed., 159, and

Ex Parte Black, 147 Fed., 823,

are opposed to the line of authorities which we have been considering, but are all cases in District Courts of the United States. The last named case, however, was appealed to the Circuit Court of Appeals of the seventh circuit, and was there affirmed.

U. S. vs. Black, 160 Fed., 431, 435.

But the Circuit Court of Appeals practically avoided a discussion of the questions, which have been heretofore discussed, by holding that the object of a conspiracy to enter public lands is fully accomplished when the entry is made, the lands are paid for and certificates issued, and that payments thereafter made by the defendants to the alleged entrymen could not be regarded as overt acts within the meaning of the statute.

It is certain not only that no one of the cases which have been cited is of any binding authority upon the Supreme Court of the United States, but that upon principle they can not be sustained as applicable to the cases here under consideration. We have shown that if this court should choose to adopt the rules laid down in the case of Commonwealth vs. Bartilson, 85 Pa. St., 482, 486, or should adopt the views expressed in the case in 160 Fed. last above cited to the effect that the matter of issuance of patents and of deeds made after the entry were not overt acts within the meaning of the statute, such ruling would

be decisive in this case, and would result in the affirmance of the decisions below, but we feel that the doctrine of conspiracies renewed with each overt act leads to conclusions that are monstrous, and practically leads to the entire destruction of the statute of limitations in such cases.

When Statutes of Limitations were new, many courts regarded them with disfavor, and many decisions were made whereby their scope was reduced, and whereby we think even the legislative intent was subverted, but in later years the courts have come to the conclusion that there is yet force in the maxim that it is for the interest of the State that there be an end to litigation; that Statutes of Limitations are based upon the same principles of justice which have been enforced by courts of equity for ages in connection with the doctrine of laches; that as suggested by this Honorable Court in the Irvine case cited from 98 U. S. there might be record evidence showing the receipt of money by an agent, which would exist long after his proof that he had paid it over properly had been lost or destroyed, and the result of all this is that at the present day Statutes of Limitations are generally looked upon far more favorably than they were in times past. But as we have suggested in these cases of alleged land frauds, it clearly appears from the various reported cases that the officers of the executive department are far from satisfied with the enforcement of the remedies pointed out by the statute, and to which we have referred, and that they feel that further criminal prosecutions in addition to those provided by Congress in the Timber and Stone Act should be sustained, and the utmost ingenuity has been displayed in the arguments put forward to assist such prosecutions.

This disposition to punish offenders against the laws does not become a subject of just criticism except where the zeal of the prosecutor goes to the extent of asking the practical nullification of statutes. It is true that the enforcement of the Statute of Limitations may result in permitting offenders to go unpunished, yet even that is a lesser evil than the subversion of law in the supposed interest of justice. The very existence of the Statute of Limitations pre-supposes that under some circum-

stances a crime may be committed, and may never be detected or prosecuted in time to permit of the infliction of a just punishment, and unless that result may sometimes be reached, the statute itself must be repealed. In the particular case now before us, that of conspiracy, the statement in the Britton case in 108 U. S., so often heretofore cited, is reinforced by a further statement of this Honorable Court in the case of Hyde vs. Shine, 199 U. S., 62, 82, where the court says:

"We think a case is made under this statute by proof of a conspiracy to defraud, and the commission of an overt act."

We have pointed out the remedies which Congress has provided in cases of frauds of the character here alleged to exist, and we might add that the Statute of Limitations in suits brought to recover back the land is six years after the issuance of patent. Whatever may be said in case of a conspiracy to commit many different and distinct frauds, it seems to us absolutely unreasonable to hold, where a conspiracy is alleged only to contemplate certain specific frauds, and in case of each and every of these frauds a crime was committed and the parties became subject to prosecution more than three years before the finding of the indictment, that they might be subjected to further and repeated prosecutions on account of each separate and distinct act which might be done in furtherance of the single conspiracy thus alleged to have been formed.

This court in the case of United States vs. Detroit Lumber Co., 200 U. S., 321, held, at page 339, Justice Brewer rendering the opinion of the court:

"The statute provides that if an entry is wrongfully made (timber and stone entry), it may, prior to patent, be set aside by the land department, the entryman forfeiting the money which he has paid. In other words, by the action of the department, the equitable title is cancelled and restored to the government. It then has both the full title to the land and the money which had been paid for it, *and this is the penalty which is imposed for the wrongful entry. Certainly when the government retains the full price which it has placed upon the land, and also recovers the land itself, it is abundantly compensated for any wrong which has been attempted by the entryman.*"

CONCLUSIONS.

LACK OF JURISDICTION IN SUPREME COURT.

This Honorable Court is without jurisdiction of these writs of error under the Act of March 2, 1907:

(a.) Because neither Section 5440 nor the Timber and Stone Act were held invalid,

(b.) Nor were either of said statutes the subject of construction by the District Court.

(c.) Nor can the jurisdiction of this court be sustained under the clause of the Act of March 2, 1907, relating to judgments sustaining "a special plea in bar," for neither a "special plea in bar" nor a judgment sustaining a "special plea in bar" appear in the records.

NO OFFENSE CHARGED.

1st. There are many "laws" of the United States under which timber lands may be entered. There is only one of those laws which indicates any policy of the government restricting the amount of land which may be entered by any one individual or corporation. These indictments charge conspiracy to procure the entering of lands under some of these laws, but do not in any manner allege that this conspiracy was a conspiracy to procure entries under the one law which restricts the amount that can be entered. The defendants are entitled to the presumption that their combination was one to procure entries under the laws which do not so restrict the area of entry, and not under the law which does so restrict it.

And, therefore, these indictments do not charge any attempt to "defraud the United States in any manner for any purpose."

2nd. Under the restrictive law to which we have referred, the only thing which the Congress of the United States attempted to prevent is the making of contracts, before the making of applications to purchase, whereby the entryman binds himself to convey the title which he shall acquire from the government to some other person.

While these indictments declare that certain entrymen, "for hire and under agreements with them separately to that end," were to be procured to enter certain lands, and to convey them to a certain corporation, there is nothing which, even inferentially, declares that it was any part of the conspiracy to make an agreement of conveyance at any time before the application to purchase, and under the rule we have stated it must be presumed that their intent was innocent, and that the defendants did not conspire to make these contracts of conveyance at any time when the laws of the United States, as interpreted by its Supreme Court, prohibited such action.

U. S. vs. Williamson, 28 Sup. Ct., Rep. 163.

3rd. Under the same restrictive law to which we have referred, the only point where any representation in regard to such agreements of conveyance is required, is at the making of the application; that is to say, when the first application is made to the officers of the government.

It has already been shown that to "defraud the United States" a false representation of some fact is necessary, and therefore it is necessary that these indictments should affirmatively show that these defendants conspired to procure the making of such representations at a time when the said representations would be false; but, in fact, these indictments show no conspiracy to procure the making of any representations by any person whatsoever. It is only by the most violent presumption that such conclusions can be reached from the allegations of these indictments. In the absence of such affirmative allegations, the defendants are entitled to the presumption that they did not conspire to procure the making of any false representations whatsoever, or any representation at a time when the same would be false, and hence did not conspire to "defraud the United States" in any manner or for any purpose.

4th. The making of false representations, if alleged, in violation of a Land Department regulation imposing on the entryman a condition not contained in the *law*, would constitute no offense.

U. S. vs. Williamson, 28 Sup. Ct., Rep. 163.

5th. But, further, if such regulation exists it has not been pleaded, and hence can not be relied upon.

U. S. v. Bedgood, 49 Fed., 54.

6th. Conclusions of law and of the pleader and not facts are pleaded.

7th. References to the overt acts are necessary in order to determine definitely the conspiracy charged.

8th. There is no certainty of allegation as to the time of the alleged offense conspired to be accomplished.

9th. There is no allegation that the defendants conspired to defraud the United States.

10th. The overt acts, alleged in each indictment, show on their face that no one of them was done in pursuance of the conspiracies charged nor to effect the object of the same, and hence in failing to charge an overt act to effect the object of the conspiracies the indictments fail to charge a crime.

11th. Statute of Limitations:

A. As to U. S. vs. Freeman et al., No. 627.

B. As to U. S. vs. Biggs et al., No. 628.

A. In U. S. vs. Freeman et al. the defendants should, because of the statute, be discharged, for the following reasons:

(a.) From the allegations of the indictment it appears that the alleged conspiracy was formed, and the first overt act thereunder was performed, more than three years prior to the finding of the indictment.

U. S. vs. Irvine, 98 U. S., 450, 452.

U. S. vs. Hirsch, 100 U. S., 33.

(b.) Because the only overt acts charged against the defendants Biggs and Freeman, alleged to have been committed with their knowledge, within three years prior to the finding of the indictment, consists in procuring the issuance of patents to the entrymen. This allegation, we contend, is of no force, because it appears from the indictment that at the time said patents were procured to be issued all but the bare legal title of the United States had already vested in the entrymen, and as the issuance of the patents was but a mere ministerial act the government could not be defrauded by their issuance, and

consequently the procuring of said patents to issue was not an act "to effect the object of the conspiracy."

Jones vs. U. S., 35 Fed., 561, 562,

and other cases heretofore cited.

(c.) The only other overt act charged in this indictment is that the defendant Nossaman, within three years prior to the finding of the indictment, procured certain deeds to be made to The New Mexico Lumber Company. There is no allegation in the indictment which says that the defendants, Biggs or Freeman, had any knowledge of or conscious participation in the procuring of said deeds.

Ware vs. U. S., 154 Fed., 575.

(d.) Further, this act of Nossaman can be of no force as to any of the defendants, for the reason that the indictment shows on its face that at the time of securing said deeds to be made patents from the government had already issued to the entrymen, the fraud attempted to be alleged against the government had been completed and the acts complained of could effectuate nothing in carrying out the alleged conspiracy.

U. S. vs. Black, 160 Fed., 431.

B. Because of the Statute of Limitations, all of the defendants in this indictment should be discharged, for the following reasons:

(a.) It appears from the allegations in the indictment that the alleged conspiracy and the first overt act both occurred more than three years before the finding of the indictment.

(b.) That the only possible act on the part of any of the defendants relating to the lands named in the indictment which occurred within three years of the finding of the indictment was the securing, as alleged, by the defendants McPhee and McGinnity, from William Barth, of a deed, which is pleaded in the indictment, and which shows on its face that it was a mere correction deed for an earlier deed, made more than three years before the finding of the indictment.

(c.) As to the defendants Biggs and Freeman, it is nowhere alleged in the indictment that they did anything in connection with the alleged conspiracy within three years prior to

the finding of the indictment, nor is either one of them said to have had any knowledge of, or conscious participation in, the securing of the correction deed above referred to. The indictment shows on its face, affirmatively, that the defendants Biggs and Freeman had no conscious participation in the alleged conspiracy at any time within three years prior to the finding of the indictment.

(d.) Because the securing of said deed could have no force or effect as an overt act. If title had passed from the government, as we contend is shown, and must be presumed, by the allegations contained in the indictment, showing "final proof" has been made, the purpose of the conspiracy had theretofore been completed, and the deed could not be said to be an act looking to, or aiding, the effectuating of the conspiracy; if the title had not passed from the government, then the deed was a mere idle thing, made by one not alleged to have been one of the conspirators.

It is respectfully submitted that the judgments of the lower court should be affirmed.

CLYDE C. DAWSON,
CHARLES J. HUGHES, JR.,
Attorneys for Defendants.

JAMES H. MCKENNEY

In the Supreme Court of the United States.

No. 290.

OCTOBER TERM, 1907.

Office Supreme Court, U. S.
FILED
OCT 10 1907
JAMES H. MCKENNEY
WITHDRAWN

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

ALEXANDER T. SULLENBERGER, JAMES S. HATCHER, ELLIS M. HAMPTON, ET AL., DEFENDANTS IN ERROR.

BRIEF OF DEFENDANTS IN ERROR.

EDMUND F. RICHARDSON,
HORACE N. HAWKINS,
Attorneys for Defendants in Error.

Smith-Brooks Press, Denver.

In the Supreme Court of the United States.

No. 629.

October Term, 1907.

THE UNITED STATES, Plaintiff in Error,

vs.

ALEXANDER T. SULLENBERGER, JAMES S. HATCHER, ELLIS M. HAMPTON, et al., Defendants in Error.

BRIEF OF DEFENDANTS IN ERROR.

STATEMENT OF THE CASE.

On the 22d day of June, 1907, an indictment was returned in the District Court for the District of Colorado, which attempts to charge Alexander T. Sullenberger, James S. Hatcher, Ellis M. Hampton, Eph. K. Caldwell, Robert E. Sloan and Eudolphus M. Taylor with a conspiracy to defraud the United States in connection with government timber lands, the indictment being founded on section 5440 of the Revised Statutes.

Each defendant filed a verified motion attacking the indictment. These motions are identical. Each is, in effect, a demurrer to the indictment, plus a plea of the statute of limitations.

On argument in the court below, the prosecution admitted the truth of the matters of fact set forth in the motions as to the statute of limitations; i. e., that defendants had not been fugitives from justice.

The court's written opinion is found on pages 76 to 82 of the record. It recites the allegations of the indictment, and

then closes with the statement that the principles set forth in the court's opinion in the case of the United States vs. Briggs, et al. (now pending as No. 628 on the docket of this court), are applicable, and that for the reasons therein given, "this indictment is bad. The motions to quash are sustained." (Page 82.)

The opinion in the Biggs case is embraced in the original record sent to this court, but pursuant to stipulation (page 93) is not set out in the present record. It will be found, however, printed in the transcript of record in the Biggs case, No. 628, which is to be heard at the same time that this case is heard. It is also reported in 157 Fed. at page 264. Looking to the opinion referred to, we find that the court held, first, that the Biggs indictment, which is in the same language as this indictment, so far as the questions involved in this case are concerned, does not charge any offense; second, that the objection to the indictment on the ground of duplicity appears to the court to be well taken, and was good, if one view of the indictment is taken, and that if another view is taken the prosecution of the offense is barred by the statute of limitations.

Upon the rendition of these opinions, an order was entered of record in the case at bar, which is found at page 73 of the printed record, reciting that the indictment was not sufficient in law to be answered unto, and ordering that the same be quashed.

Afterwards an order was entered, which is found at page 74 of the printed record, and which sets aside the first order and sustains the defendant's motions, including the defense based on the statute of limitations. The defendants were ordered discharged "to go hence hereof without day," but were also ordered to enter into a personal recognizance to answer the indictment in the event of a reversal of the judgment.

The United States has sued out a writ of error to this court.

On behalf of the defendants in error we contend:

First. That this court has no jurisdiction to review the lower court's ruling.

Second. That the indictment contains no charge of a crime, in that it charges the plan or alleged conspiracy of defendants to have been simply an agreement or plan to obtain *indirectly* lands for a corporation that could not, according to the indictment, have been *directly* purchased by the said corporation. A plan to obtain indirectly lands from the government may or may not be a plan to defraud the government. Whether or not it is a scheme to defraud the government, necessarily depends upon the question of whether or not the means to be adopted are criminal or unlawful.

No unlawful or criminal means are charged to have been planned or contemplated, there being no claim made in the indictment that the defendants agreed, or planned to hire, employ or induce anyone to make application to purchase lands. In other words, no claim is made anywhere in the indictment that the alleged conspiracy embraced the making of a deal or agreement with any person in advance of that person having made, in good faith, an application to purchase the land. There is, therefore, no charge of a conspiracy to defraud the United States.

Third. The defendants were entitled to be discharged because the offense, if any is charged, is alleged to have been committed more than three years before the indictment was returned, and is barred by the statute of limitations.

Fourth. If the indictment does charge with sufficient certainty an offense within three years, then the indictment is bad for duplicity, in that, in one count there is charged an offense committed more than three years before indictment, and also an offense committed within three years.

Fifth. The indictment is bad for uncertainty and indefiniteness.

Each of these propositions will now be considered.

I.

THE INDICTMENT CHARGES NO OFFENSE.

An analysis of the indictment in this case will, we think, show clearly that no offense is charged. While it is a very

lengthy document, the charging part of the indictment is comparatively brief, the greater part being taken up in setting forth sixty-eight alleged overt acts.

Boiled down, the allegations of the indictment are that defendants "on the 6th day of June, 1901, and at the several times of the committing of the overt acts hereinafter in this indictment mentioned, and continuously at all times between the said 6th day of June in the year last aforesaid and the day of the presenting of this indictment, at Durango aforesaid, in the said district, unlawfully, corruptly, wickedly and maliciously did conspire, combine, confederate and agree together * * * *indirectly* to obtain from the said United States, for a certain corporation, to wit, the Pagosa Lumber Company * * * 2,990 acres of timber land in excess of the quantity of lands which the said corporation could lawfully obtain *directly* from the said United States, regard being had to the laws thereof pertaining to the entry and sale of such lands." It is further alleged that the lands so to be obtained lay within the Durango land district, in the district of Colorado, and were open to entry as "timber lands," and that the lands are described later in that part of the indictment where the defendants are charged with committing overt acts 1 to 18, both inclusive.

We have now given all of the charging part proper of the indictment. What follows later is an attempt to set forth the means which were to be adopted to carry out the so-called conspiracy, and the overt acts committed. These later parts of the indictment we shall notice in due time. Just now we want to notice for a moment this most remarkable charging part of the indictment. We say "most remarkable," for the reason that it is unlike any other indictment that ever came before any court, so far as we can find. Indictments have been drawn before for conspiracies to defraud the government in connection with timber lands, and convictions have been sustained by the appellate courts. But in no one of such cases did the indictment contain any such language as is used in this indictment. The pleader in this case, disregarding all precedents, charged the defendants with *planning to obtain indirectly for a corporation more*

lands than it could obtain directly That and nothing more. Such a charge states no element of a crime against the United States, as we shall later show. No language is used which shows that any scheme or artifice to defraud the United States in any way was planned or entered into. The pleader does not even state the legal conclusion that a scheme or conspiracy to defraud was formed. He simply proceeds on the theory that it is necessarily a crime to plan to obtain for a corporation, by *indirect* means, lands which cannot be *directly* purchased by that corporation in its own name.

Such a charge falls far short of alleging a conspiracy to defraud the United States.

Now, having given the charging part of the indictment, let us consider the next part of the indictment, to wit, that which attempts to set out the means to be adopted by the alleged conspirators in their plan of securing for the corporation, "indirectly," lands which it could not "directly" purchase from the government.

We will quote every word of this part of the indictment:

"And the grand jurors aforesaid, upon their oaths aforesaid, do further present that the said timber lands were so to be obtained as aforesaid from the said United States for the said corporation, by the said defendants, soliciting and procuring the persons aforesaid for hire, and under agreements with them separately to that end, to pay to the receiver of the said land office with moneys to be furnished to them by the said corporation the price fixed by law therefor, make entries as individual entrymen at the land office aforesaid, with the said register, of tracts of such lands in quantities respectively, not exceeding the quantities allowed by the said laws and regulations, secure patents from the said United States for the said lands to themselves as such entrymen, and make conveyances of the title to the said lands to the said corporation."

It will be noticed that the means contemplated by the alleged conspirators *did not embrace the hiring or inducing of any person to make the application required by section 2 of the timber and stone act.* It is not charged anywhere in the indictment, either in the charging part or in that part describing the

means to be adopted, or in the allegations as to overt acts, that any such plan was ever devised or planned, or that any such thing was ever done in any instance. It will also be noticed that nowhere is it alleged that the alleged scheme ever embraced the making of either a direct or an indirect agreement with anyone in advance of an application to purchase being made. Nor is it anywhere in the indictment alleged that any agreement, direct or indirect, was ever made with any entryman in advance of the application to purchase being filed. The means to be adopted, according to the indictment, were simply that after entrymen had made applications to purchase, then agreements were to be made with them, by which they were to be furnished with money to complete their purchase, the lands to be conveyed to the corporation when patents were obtained.

The theory of the pleader was, evidently, that it was unlawful for an applicant to make any agreement of sale after he had made his application to purchase, and in advance of his obtaining patent or receiver's receipt. This was the theory urged by the government's counsel on the hearing in the court below. In other words, it was contended by the prosecution that the Land Office had the right to require the applicant under the timber and stone act, after advertisement, to make the same affidavit which section 2 of the statute requires to be made when the application is first filed; that the making of such an affidavit, if it was untrue, was perjury, and that the law did not permit an agreement of sale to be made between the time of filing of an application and the time of making final proof. Since the decision by this court of the case of Williamson vs. U. S., 207 U. S., 425, such a claim is, of course, no longer tenable. We submit that when the Williamson case was decided this indictment was no longer subject to debate.

But let us proceed with our analysis of the indictment. We have given the language down to the setting forth of the alleged overt acts. Let us now notice this part of the indictment. There are, as before stated, sixty-eight alleged overt acts set forth. These can be easily divided into four classes, to wit:

First. Overt acts 1 to 19, both inclusive, consist of the hiring or procuring of nineteen different persons to execute and

verify the "testimony of claimant," required to be given after the applicant has made his application to purchase, and after advertisement has been made.

Second. Overt acts 20 to 39, both inclusive, consist of the furnishing to each of the same nineteen persons $400 with which to pay the receiver for the land entered, the dates being fixed at the same time as the dates of the hiring, to wit, after application to purchase and after advertisement.

Third. Overt acts 40 to 57, both inclusive, charge the defendants with having required and procured the entrymen to make deeds to the Pagosa Lumber Company, the dates fixed being after application to purchase and after advertisement.

Fourth. Overt acts 58 to 68 charge the defendants with having, after advertisement and final proof, caused the United States to issue patents for a part of the lands.

It will thus be seen, as before stated, that nowhere is there any charge that the defendants ever either planned to do or did do anything in advance of an applicant having, in good faith, applied to purchase.

We repeat that when it was held by this court in the Williamson case that an entryman could legally contract to sell his lands as soon as he had, in good faith, made his application to purchase, this indictment fell to the ground.

We have now given every part of the indictment that can be considered by the court in determining whether or not an offense is charged. But it may be said that we have omitted the concluding part of the indictment. It is true that we have not called attention to that part of the indictment. After having set forth all the facts claimed to exist as to the alleged conspiracy and the alleged overt acts, the indictment closes as follows:

"*And so* the grand jurors aforesaid, upon their oaths aforesaid, do say that the said Alexander T. Sullenberger, James S. Hatcher, Ellis M. Hampton, Eph K. Caldwell, Robert E. Sloan and Eudolphus M. Taylor, on the said sixth day of June, in the year nineteen hundred and one, and from thence hitherto, and at the several times of the committing of the said several overt acts in this indictment charged (the said unlawful, corrupt, wicked and malicious conspiracy, combination, confederation

and agreement, during all the time from the said day when the same was originally entered into, to wit, the said sixth day of June, in the year nineteen hundred and one, to the date of the presenting of this indictment, being still continuing and in existence), in manner and form in this indictment aforesaid, unlawfully, corruptly, wickedly and maliciously did conspire, combine, confederate and agree together, and with others, indirectly, deceitfully and fraudulently to obtain from the said United States, for the said corporation, certain of the public lands and property of the said United States, in a quantity greatly in excess of the quantity which the said corporation could lawfully obtain directly from the said United States under a proper and lawful administration of the said laws and regulations, and thereby, and in that manner, defraud the said United States of its valuable property in such lands, and also of its governmental function in the matter of preserving and disposing of the same lands, as well as out of its right to administer an intelligent and honest service in that behalf in the interests of the people of the said United States; against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided."

This part of the indictment, it may be claimed, helps out the other parts of the indictment and makes the indictment contain a charge of conspiracy to defraud the United States out of timber lands. Such a claim has no foundation. In the first place such a 'tail piece," beginning with the words, "*and so the grand jurors aforesaid, upon their oaths do say,*" at the end of an indictment, is held by the courts to be a mere legal deduction of the pleader, and not any part of the charging part of an indictment. This exact form of the conclusion of an indictment has been repeatedly before the courts, and has been held to add nothing to the charge already made. (See Fouts vs. State, 8 Ohio St., 98, 118; Drake vs. State, 19 Ohio St., 211). But if this concluding part of the indictment should be considered a part of the charging part of the indictment, still nothing in substance is added by it. Considering this concluding part, the charge, then, is that the defendants agreed to obtain for a corporation lands in excess of what the corporation could "obtain directly from the United States," "and *thereby* defraud the United States." In other words, nothing of substance is added by the concluding part of the indictment, the pleader

simply adding his legal conclusion, that to plan to obtain for a corporation more lands than it could in its own name purchase from the United States was necessarily a conspiracy to defraud the United States.

Now, having set forth the different parts of the indictment, and commented to some extent upon each part, let us consider the indictment as a whole, with reference to whether or not it charges a crime.

The indictment recites that the lands concerning which the alleged conspiracy was formed and entered into were "timber lands," and subject to sale under the laws relating to the sale of such lands, and the "overt acts" alleged in the indictment show that the lands were obtained by applicants purchasing under the "timber and stone" act. A short review of the provisions of this act is necessary.

The "timber and stone" act became a law on June 3d, 1878. As originally passed it only applied to lands in certain states, but on August 4th, 1892, the law was amended to include all states where the United States owned lands.

Section 1 of the act provides that surveyed public lands not included within military, Indian or other reservations, valuable chiefly for timber, or for stone, and unfit for cultivation, and which have not been offered for public sale, may be sold to citizens or persons who have declared their intention to become such, in quantities not exceeding 160 acres to any one person or association of persons, at the minimum price of $2.50 per acre, but that the act shall not authorize the sale of lands containing gold, silver, cinnabar, copper or coal.

Section 2 provides that any person desiring to purchase shall file with the register of the Land Office a written, verified statement, designating the tract desired to be purchased, setting forth that the same is unfit for cultivation and valuable chiefly for its timber or stone; that applicant has made no other application under the act; that he does not apply to purchase on speculation, but in good faith, to appropriate it to his own exclusive use and benefit, and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whomsoever, by which the title

should inure, in whole or in part, to the benefit of any person except himself. An applicant taking such oath falsely is declared to be subject to the penalties for perjury, and in addition forfeits the money paid for the lands and all right and title in the same, and any grant or conveyance which he may have made, except in the hands of bona fide purchasers, is declared to be null and void.

Section 3 of the act provides that upon the filing of the application to purchase, the register shall post notice thereof for sixty days, and furnish a copy of the notice for publication in a newspaper for a like period. After the advertising period the applicant is required to furnish satisfactory evidence, first, of publication; second, that the land is of the character contemplated in the act. Upon payment of the purchase money and the Land Office fees, the applicant is permitted to "enter" the tract, and on transmission to the General Land Office of the papers and testimony, patent issues. It is further provided that any person having any valid claim to the land may object in writing to the issuance of a patent, and the objection shall be heard and determined and an appeal taken as in other land cases. The section concludes as follows: "Effect shall be given to the foregoing provisions of this act by regulations to be prescribed by the Commissioner of the General Land Office."

We have now given all the provisions of the act in any way material to the consideration of this case.

Under the power thus conferred to prescribe regulations, the Commissioner of the Land Office, upon the passage of the act, formulated a set of blank forms to be used by persons desiring to purchase. These forms will be found in all of the printed circulars of the Land Office touching the manner of acquiring title to public lands. The form of the affidavit required by section 2 of the act is headed "Timber and Stone Lands—Sworn Statement," and is in strict conformity with said section. The blank form to cover the "satisfactory evidence" required by section 3 is headed "Timber and Stone Lands—Testimony of Claimant," and is in the form of questions to be answered under oath by the applicant, and contains, in addition to questions as to whether or not the land is mineral land, the following:

"Q. 13. Have you sold or transferred your claim to this land *since making your sworn statement*, or have you directly or indirectly made any agreement or contract, in any way or manner, with any person whomsoever, by which the title which you may acquire from the government of the United States may inure, in whole or in part, to the benefit of any person, except yourself? A. ———.

"Q. 14. Do you make this entry in good faith for the appropriation of the land exclusively to your own use, and not for the use or benefit or any other person? A. ———.

"Q. 15. Has any other person than yourself, or has any firm, corporation or association, any interest in the entry you are now making, or in the land, or in the timber thereon? A. ———."

In addition, the blank form of questions required to be answered by the entryman's witnesses contains the following:

"Q. 10. Do you know whether the applicant has directly or indirectly made any agreement or contract, in any way or manner, with any person whomsoever, by which the title which he may acquire from the government of the United States may inure in whole or in part to the benefit of any person, except himself? A. ———."

Answers to all of these questions have always been required by the Land Office. It will be seen at a glance that the Commissioner, in prescribing these forms, undertook to add considerably to the legislative act, in that he required testimony *on the final proof* not required by the statute. By departmental regulation it was attempted to prevent alienation of the land, and contracts with reference to its alienation, *between the date of the first application and the date of the entry*. It has been always strenuously insisted by the Land Office that such rules were legal. The Land Office prints on these blanks that an untrue answer to any question asked constitutes perjury, and holds that any agreement made *prior to final proof* to sell land embraced in a timber claim defeats the right of purchase. See Shepherd vs. Bird, 17 L. D., 82.

It was under this theory that the indictment in this case was drawn, viz., that any men who planned to obtain title to timber and stone lands at any time *between the date of an appli-*

cation to purchase and the date of final proof were guilty of a conspiracy to defraud the United States, and that it was unlawful for an applicant to alienate or to agree to alienate the land he had applied to purchase *until after he had made his final proof.* The indictment clearly shows that it is based on this theory. It nowhere charges that the defendants contemplated hiring or inducing anyone *to apply to purchase lands.* It nowhere charges that the defendants contemplated hiring any one to commit perjury in his application to purchase. It nowhere alleges that any false statement was made in any affidavit made under section 2 of the act. In fact, it nowhere mentions this affidavit. It does allege over and over again that men were hired to verify the "Testimony of Claimant," in which, under the rules of the Land Office, applicants were required to say, after advertisement, that they had no contract or agreement of sale, and it does allege over and over again that the $400 final payment was furnished by the defendants. It is nowhere alleged that the defendants paid or had anything to do with the payment of the filing fees, which were required to be paid *when the applicants made their filings.* On all of these matters the indictment is as silent as the tomb. The whole theory of the prosecution was that it was an unlawful conspiracy to plan to get government timber lands *until after final proof.* This theory was openly avowed by counsel for the government on the hearing before the judge of the nisi prius court, who says, in his opinion in the Biggs case: "*We find that the indictment sets in where the second section of the timber and stone act leaves off.*" The court further states that it was not denied by counsel for the government that the "Testimony of Claimant" mentioned in the indictment was the *final proof* required by the land officials after the sixty days' publication provided for by section 3 of the act, and that the indictment does not charge that the defendants conspired to procure others to make applications to purchase lands. (See Printed Record containing opinion in the Biggs case No. 628.)

So we contend that the theory of the pleader who drew the indictment was that it was an offense for defendants to plan to obtain title at any time *before final proof*, and that the indict-

ment was so drawn and returned. If anything else is now claimed (and we have not yet seen the brief of the government) it will be simply because the recent decision by this court in the Williamson case, *supra,* has rendered this original claim of the prosecution untenable. The holding of the court in the Williamson case, that a bona fide applicant, after making his application, can alienate the land in advance of final proof without doing anything illegal, necessarily destroys the claim that the defendants in this case were guilty of a conspiracy to defraud the United States.

It may, and will, doubtless, be said that the statement that men were hired to "*make entries*" includes the charge that they were hired to make *applications to purchase;* that the word "entry" is a broad term, and is used in the indictment in the sense of the proceedings as a whole. It is true that the word "entry" is sometimes so used in *homestead cases.* For instance, in Dealy vs. U. S., 152 U. S., 539, the indictment alleged that the conspiracy was to be carried into effect by means of "false, feigned, illegal and fictitious entries under the homestead laws of the United States." It was insisted by counsel for defendant that, in a *homestead case* the word "entry" meant the *first* filing. Justice Brewer, speaking for the court, says, at page 545:

"But the popular understanding of the word is not thus limited. It is common to speak of an entry of land *under the homestead law*, meaning thereby not a mere preliminary application, but the proceedings as a whole, the complete transfer of title."

He further states that, considering other parts of the indictment, the word entry in the indictment is clearly used in its popular sense.

Again, in Stevens vs. U. S., 152 Fed., 900, the indictment charged a conspiracy to defraud the United States of the title and possession of lands "under the homestead laws of the United States, by means of false, feigned, forged, fraudulent and fictitious entries of said lands under the homestead laws of the United States." Justice Vandevanter, in delivering the opinion of the Court of Appeals, says:

"In statutes, and in common parlance, the word 'entries,' when applied to proceedings in the land offices *under the homestead law*, is used with various meanings—sometimes in the sense of preliminary entries, at other times in the sense of final entries, and again in the sense of the proceedings as a whole. In this indictment it is evidently used in the sense of the proceedings as a whole, because it refers to that whereby the possession and title are acquired, and so embraces preliminary entries."

It will be seen that the ruling in both of these decisions is that in *homestead* cases the word mentioned has different meanings, and that the court will look to all of the charging part of the indictment to see in what sense the pleader used the term. This is absolutely correct as to homestead cases. Under the law, when a homestead filing is made, the land is at once segregated on the books of the Land Office and is considered "entered," although, of course, the entry is not complete until final proof. But under the timber and stone act, the word "entry" has but one meaning. The statute does not permit an entry until after final proof. The word "entry" is not used in the timber and stone act except in the third section, and there it is said, after providing for the final proof, that "upon payment to the proper office of the purchase money of said land, together with the fees of the register and receiver, * * * the applicant may be permitted *to enter said tract* * * *."

This shows that the law does not contemplate an "entry" being made until after advertisement and proof. Up to this time the proceeding is considered not as an entry, but as an application to purchase. The practice of the Land Office has always been in accordance with this view. When an application to purchase under the timber and stone act is filed, the Land Office does not consider the land segregated, and has always ruled that until final proof the applicant has no right to the land. In Smith vs. Martin, 2 L. D., 333, and in the case of Frederick, 8 L. D., 413, the first filing in a timber and stone case is referred to as "the filing of a *preliminary application*." The word entry has no popular meaning as applied to timber and stone lands, so as to include, as in homestead cases, the whole proceedings by which title is acquired.

But let us, for the sake of the argument, assume that we are wrong, and that, as a matter of fact, as applied to timber and stone cases, the word "entry" does have different meanings, and that one of those meanings embraces the whole proceedings. We then are required by the two opinions of Justices Brewer and Van Devanter, before mentioned, to look to the whole indictment to see in what sense the word is used in this indictment. Adopting this rule, it clearly appears that the word is used in the sense in which it is used in the act, viz., as the entry which the applicant is permitted to make after advertisement and proof. This is shown:

(1) By the fact that the words "make entries" appear after the statement that persons were procured to pay, with moneys furnished by the corporation, the price fixed by law for the lands. If the pleader had intended to refer to the original application, he would have reversed the order of the statement.

(2) By the fact that nowhere is there in the statement of overt acts any charge that defendants did secure, or employ, or cause anyone to file an application to purchase. If it was intended to charge that the alleged conspiracy embraced the plan of having agents or dummies make the applications to file on timber and stone lands, it is impossible to conceive of the failure to make some such charge in that part of the indictment which is headed "Overt Acts."

(3) By the fact that the well-known theory of the Land Office and of the Department of Justice has been, as it was sought to have this court hold in the Williamson case, that there could be no contract or dealing with reference to the land until after advertisement had been made and proof furnished. This theory was so clearly carried into the indictment that the trial judge said: "*We find that the indictment sets in where the second section of the timber and stone act leaves off.*"

We submit that the allegation that persons were to be procured to "make entries," as used in the indictment, does not, in anyway, show that the defendants are charged with an agreement to procure persons to make applications to purchase.

The theory that a plan to "indirectly" obtain timber lands is necessarily unlawful has been thoroughly exploded by the

courts. It is entirely lawful to plan to obtain timber lands "indirectly" so long as the plan does not embrace the making of an agreement with applicants in advance of their first filing. There are a number of ways in which it could be planned to obtain lands *indirectly* where the plan would be perfectly legal. The purchase of assignable "scrip" is one of them. There are no timber lands that cannot be purchased by the use of scrip. Timber lands are being so purchased by corporations every day.

In U. S. vs. Budd, 144 U. S., 155, this court said of one Montgomery, who, it is claimed, had acquired over ten thousand acres of timber land by "indirect" methods: "Montgomery might rightfully go or send into the vicinity and make known generally, or to individuals, a willingness to buy timber land at a price in excess of that which it would cost to obtain it from the government * * *."

It clearly appeared from the testimony in that case that a plan had been formed by Montgomery to "indirectly" obtain timber lands. Yet this court held that the formation of such a plan did not furnish sufficient grounds to cancel a patent on the application of the United States. We submit that if this is the rule in a civil action, it certainly cannot be said that the defendants in this case are charged with any crime by the indictment returned against them. We submit that the indictment sets forth no unlawful plan or agreement, and does not show that defendants used or planned to use any unlawful or illegal means to carry out their alleged plan.

In conclusion, we submit the following authorities, which we believe will be helpful to the court in considering whether or not the indictment charges an offense. Some of them are also applicable upon the other questions which will be raised later in this brief.

The sixth amendment to the Constitution of the United States secures to the defendants, among other things, the right "to be informed of the nature and cause of the accusation."

U. S. vs. Miller 7 Pet. (32 U. S.), 1422.

U. S. vs. Cruikshank, 92 U. S., 542, 558.

Evans vs. U. S., 153 U. S., 584; 14 S. C. R., 934.

All the essential elements of fact required to be set forth in an indictment must be there charged in direct, positive and explicit language. Any omission in that behalf cannot be aided by implication, inference, argument, recital or intendment. This principle has been well stated in

U. S. vs. Post, 113 Fed., 854.

Pettibone vs. U. S., 148 U. S., 197.

U. S. vs. Hess, 124 U. S., 486.

U. S. vs. Staats, 49 U. S. (8 How.), 41, 44.

In re Wolf, 27 Fed., 606, 611.

In re Corning, 51 Fed., 205, 210.

"In an indictment nothing material shall be taken by intendment or implication."

Salla vs. United States (C. C. A., 9th Cir.), 104 Fed., 544, 547.

In Miller vs. United States, 133 Fed., 337, the Circuit Court of Appeals for the 8th Circuit, where the defendants were charged under section 5440 of conspiring to commit an offense against the United States, has said:

"The contention upon which counsel for the defendants seem to reply most confidently is that the indictment does not disclose the scheme or artifice to defraud with the necessary clearness and certainty. Every man is presumed to be innocent until his guilt is established. When one is indicted for a serious offense, the presumption is that he is not guilty, and that he is ignorant of the supposed facts upon which the charge against him is founded. He is unable to secure and present the evidence in his defense—indeed, he is deprived of all reasonable opportunity to defend—unless the indictment clearly discloses the facts upon which the charge of the commission of the offense is based. It must set forth the facts which the pleader claims constitute the alleged transgression so distinctly as to advise the accused of the charge which he has to meet so fully as to give him a fair opportunity to prepare his defense, so particularly as to enable him to avail himself of a conviction or acquittal in defense of another prosecution for the same crime, and so clearly that the court, upon an examination of the indictment, may be able to determine whether or not, under the law,

the facts there stated are sufficient to support a conviction. United States vs. Hess, 124 U. S., 483, 486, 487; 8 Sup. Ct., 571; 31 L. Ed., 516. United States vs. Post (D. C.), 113 Fed., 852."

In U. S. vs. Cruikshank, 92 U. S., 542, 557, 559, the Supreme Court of the United States said:

"In criminal cases prosecuted under the laws of the United States the accused has the constitutional right 'to be informed of the nature and cause of the accusation.' Amend. VI. In United States vs. Mills, 7 Pet., 142, this was construed to mean that the indictment must set forth the offense 'with clearness and all necessary certainty to apprise the accused of the crime with which he stands charged;' and in United States vs. Cook, 17 Wall., 174, that 'every ingredient of which the offense is composed must be accurately and clearly alleged.' It is an elementary principle of criminal pleading that, where the definition of an offense, whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species—it must descend to particulars.' 1 Arch. Cr. Pr. and Pl., 291. The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent, and these must be set forth in the indictment, with reasonable particularity of time, place and circumstances.

"It is a crime to steal goods and chattels, but an indictment would be bad that did not specify, with some degree of certainty, the articles stolen. This because the accused must be advised of the essential particulars of the charge against him, and the court must be able to decide whether the property taken was such as was the subject of larceny. So, too, it is in some states a crime for two or more persons to conspire to cheat and defraud another out of his property; but it has been held that an indictment for such an offense must contain allegations setting forth the means proposed to be used to accomplish the purpose. This because, to make such a purpose criminal, the conspiracy must be to cheat and defraud in a mode made criminal by statute; and, as all cheating and defrauding has not been made criminal, it is necessary for the indictment to state the means proposed,

in order that the court may see that they are in fact illegal. *State vs. Parker*, 43 N. H., 83; *State vs. Keach*, 40 Vt., 118; *Alderman vs. The People*, 4 Mich., 414; *State vs. Roberts*, 34 Me., 32. In Maine it is an offense for two or more to conspire with the intent unlawfully and wickedly to commit any crime punishable by imprisonment in the state prison (*State vs. Roberts*); but we think it will hardly be claimed that an indictment would be good under this statute which charges the object of the conspiracy to have been 'unlawfully and wickedly to commit each, every, all and singular, the crimes punishable by imprisonment in the state prison.' All crimes are not so punishable. Whether a particular crime be such a one or not is a question of law. The accused has, therefore, the right to have a specification of the charge against him in this respect, in order that he may decide whether he should present his defense by motion to quash, demurrer or plea; and the court, that it may determine whether the facts will sustain the indictment. So here the crime is made to consist in the unlawful combination with an intent to prevent the enjoyment of any right granted or secured by the Constitution, etc. All rights are not so granted or secured. Whether one is so or not is a question of law, to be decided by the court, not the prosecutor. Therefore, the indictment should state the particulars, to inform the court as well as the accused. It must be made to appear—that is to say, appear from the indictment, without going further—that the acts charged will, if proved, support a conviction for the offense alleged."

In United States vs. Hess, 124 U. S., 483, under section 5480, the defendant was indicted for the alleged offense of devising "a scheme to defraud divers other persons," through the postoffice establishment. On page 486 the court says:

"The statute is directed against 'devising or intending to devise any scheme or artifice to defraud,' to be effected by communication through the postoffice. As a foundation for the charge, a scheme or artifice to defraud must be stated, which the accused either devised or intended to devise, with all such particulars as are essential to constitute the scheme or artifice, and to acquaint him with what he must meet on the trial."

In United States vs. Walsh, 5 Dill., 58, 63, 28 Fed. Cases, Case No. 16636, page 396, Dillon, C. J., says:

"The conspiracy to defraud the United States is alleged to consist in 'certifying that certain false and fraudulent accounts

and vouchers for material for use in the construction of the said custom house and postoffice, and for labor performed on said buildings, were true and correct.' What can be more general and indefinite that this? It is not alleged that the conspiracy was to certify falsely all accounts and vouchers for material and labor for the building, but to certify 'that certain false accounts and vouchers for material and labor were true and correct.' This is all. But what accounts and vouchers is not alleged. How does this advise the defendant so as to enable him to make his defense; what accounts or what vouchers are to be impeached? How can the court know, if a trial is gone into under this indictment, whether the accounts and vouchers offered in evidence by the government are the same ones in respect to which the grand jury found the bill of indictment? Lambert vs. People, 9 Cow., 578. If the defendants are convicted or acquitted on an indictment so general and uncertain, how can they plead the judgment in bar of another prosecution? How does it appear that the accounts and vouchers were such as that an intent to defraud the United States can be predicated of them? No dates, sums, amounts, persons or materials are mentioned, and it does not appear that this could not be done, for the allegation is that the conspiracy related to 'certain false and fraudulent accounts.' We agree with the Supreme Court of Pennsylvania, in the case cited, that 'precision in the description of the offense is of the last importance to the innocent,' and hence the importance of the decision of the United States Supreme Court in the Cruikshank case, which settles the law for all the courts of the United States."

In United States vs. Martin, 26 Fed., Cases, Case No. 15728, said:

"The general rule is that the charge must be laid in the indictment so as to bring the case within the description of the offense as given in the statute, alleging distinctly all the essential requisites that constitute it.

"Nothing is to be left to implication or intendment. Generally speaking, it is sufficient to pursue the words of the act; but if, in pursuing them, there should be any ambiguity or uncertainty in charging the offense, the pleader should regard the substance and legal effect of the enactment. And when words or terms of art are used in the description, that have a technical meaning at common law, these should be followed, being the only terms to express in apt and legal language the nature and character of the crime."

In United States vs. Martin, 26 Fed. Cases, Case No. 15728, page 1178, the court said:

"Indictable offenses, whether created by statute or recognized as arising at common law, usually contain more than one element or ingredient, and the rule is universal, that unless every material ingredient of the charge is set forth in the indictment, the defect may be reached by demurrer, or the judgment may be arrested."

In Pettibone vs. United States, 148 U. S., 197, 202, the defendants were charged with a criminal conspiracy under section 5440, and the court said:

"The confederacy to commit the offense is the gist of the criminality under this section, although to complete it some act to effect the object of the conspiracy is needed. *United States vs. Hirsch*, 100 U. S., 33.

"This is a conviction for conspiracy, corruptly and by threats and force, to obstruct the due administration of justice in the Circuit Court of the United States for the District of Idaho, and the combination of minds for the unlawful purpose and the overt act in effectuation of that purpose must appear charged in the indictment.

"The general rule in reference to an indictment is that all the material facts and circumstances embraced in the definition of the offense must be stated, and that, if any essential element of the crime is omitted, such omission can not be supplied by intendment or implication. The charge must be made directly and not inferentially or by way of recital."

In re Wolf, 27 Fed., 606, 611, the court says:

"It is manifest that to constitute a criminal offense under this section the object of the conspiracy must be to commit some offense against the United States; that is, to do some act made a crime by the laws of the United States, or to defraud the United States; and that something must be done by one or more of the conspirators to effect the object of the conspiracy. The definition of this offense would be 'an agreement between two or more persons to do some act which, by the laws of the United States, is a crime, and the doing of some act, by one or more of those who had so agreed, in furtherance of or to effect the object of the agreement.' To constitute a good indictment under this section, it must charge that the conspiracy was to do some act made a crime by the laws of the United States, and it must

state with such reasonable certainty the acts intended to be effected or carried out by the agreement of the parties, so that it can be seen the object of the conspiracy was a crime against the United States. The conspiracy or agreement, and the doing of some act in furtherance of it, make up the offense. The object of it, however, is a requisite of the indictment."

In United States vs. Crafton, 25 Fed. Cases, Case No. 14881, page 682, Dillon, C. J., says: "Under the recognized rules of criminal pleading, it is not sufficient to allege generally a conspiracy to defraud; but the nature of the fraud, and, to the required extent, the manner in which, or the means by which, it was to be effected, must be averred."

In United States vs. Watson, 17 Fed., 145, under section 5440, the defendants were charged with conspiring to commit a crime against the United States. The court, in considering the sufficiency of the indictment under this section, says:

"To constitute a good information or indictment under this section, it must charge that the conspiracy was to do some act made a crime by the laws of the United States, and must state with sufficient certainty the acts intended to be effected or carried out by the conspiracy or agreement of the parties; in other words, must sufficiently state the offense intended to be committed, and must then state some act done by one of the conspirators towards effecting the object of the conspiracy."

In United States vs. Taffe, 86 Fed., 113, 115, the court said:

"To constitute a good indictment under section 5440, Rev. St., it must charge that the conspiracy was to do some act made a crime by the laws of the United States; and it must state with reasonable certainty the acts intended to be effected or carried out by the agreement of the parties, so that it can be seen that the object of the conspiracy was a crime against the United States. In re Wolf, 27 Fed., 611. In this case the first count contains no averment of facts constituting the offense which the conspiracy was formed to commit. The averment that defendants conspired to commit the offense of corruptly endeavoring to influence a petit jury of the United States, in the Circuit Court of the United States for the district of Oregon, does not describe an offense. It states a mere conclusion of the pleader. Nothing is added to the generic terms by which such crime is described, except the statement that the jury was a petit jury, and was in the Circuit Court of the

United States for the district of Oregon. The acts which were intended in this crime, and which are necessary to its commission, are not set forth."

In a well considered decision (In re Greene, 52 Fed., 104, 111-2, 114, the court said:

"The several counts of the present indictment must be tested, not by the general recitals and averments thereof, although in the words of the statutes, but by the specific acts or particular facts, which are alleged to have been actually done and committed by the accused. If the particular acts or facts charged do not, as a matter of law, constitute contracts, combinations or conspiracies in restraint of trade and commerce among the several states, or a monopoly or attempt to monopolize any part of such trade or commerce, no amount of averments and allegations that the accused 'engaged in a combination' or 'made contracts in restraint' of such trade or commerce, or 'monopolized' or 'attempted to monopolize' the same, will avail to sustain the indictment. *Whether the accused is charged with an offense is to be determined by the particular acts or facts set forth, and not by the conclusions of the pleader*, although asserted in the words of the statute: 'Every offense consists of certain acts done or omitted under certain circumstances, and in the indictment for the offense it is not sufficient to charge the accused generally with having committed the offense, but all the circumstances constituting the offense must be specially set forth.' U. S. vs. Cruikshank, 92 U. S., 542, 563. * * * Stripping the indictment of its verbiage—its general recitals and conclusions of law—does either count thereof charge any real offense against the United States over which the District Court of Massachusetts has jurisdiction? * * * The charge is too vague and general to show a 'contract' in restraint of trade, such as the first section of the act contemplates and declares illegal. It can not be aided by presumption or intendments. It is bad upon its face, and charges no offense committed in the state of Massachusetts, of which the United States courts in that state could take jurisdiction."

In Evans vs. U. S., 153 U. S., 584, 587, the court says:

"The crime must be charged with precision and certainty, and every ingredient of which it is composed must be accurately and clearly alleged. * * * Even in the cases of misdemeanors, the indictment must be free from all ambiguity, and leave no doubt in the minds of the accused and the court of the

exact offense intended to be charged, not only that the former may know what he is called upon to meet, but that, upon a plea of former acquittal or conviction, the record may show with accuracy the exact offense to which the plea relates."

In United States vs. Britton, 107 U. S., 655, 669, where the defendant was charged with a wilful misapplication of the funds of a bank, Mr. Justice Woods said:

"It would not be sufficient simply to aver that the defendant 'wilfully misapplied' the funds of the association. * * * There must be averments to show how the application was made, and that it was an unlawful one."

The following rule is thus laid down in United States vs. Britton, 108 U. S., 199, 205:

"It follows that as a rule of criminal pleading that in an indictment for conspiracy under section 5440, the conspiracy must be sufficiently charged, and that it can not be aided by the averments of acts done by one or more of the conspirators in furtherance of the object of the conspiracy."

The principle thus stated has been approved, affirmed and applied in

Pettibone vs. United States, 148 U. S., 197, 203.

United States vs. Milner, 36 Fed., 890.

United States vs. Taffe, 86 Fed., 113, 115-6.

Conrad vs. United States (C. C. A., 5th Cir.), 127 Fed., 789, 801.

Stearns vs. United States (C. C. A., 8th Cir.), 152 Fed., 900, 904.

People vs. Willis, 54 N. Y. S., 130, 137, citing other authorities.

The office of the overt act in a conspiracy indictment is defined, by the Supreme Court in United States vs. Britton, 108 U. S., 204:

"The offense charged in the counts of this indictment is a conspiracy. This offense does not consist of both the conspiracy and the acts done to effect the object of the conspiracy, but of

the conspiracy alone. The provision of the statute, that there must be an act done to effect the object of the conspiracy, merely affords a *locus penitentiae*, so that before the act done either one or all of the parties may abandon their design, and thus avoid the penalty prescribed by the statute."

"The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislature, not in the judicial department. It is the legislature, not the court, which is to define a crime, and ordain its punishment. * * * To determine that a case is within the intentjon of a statute, its language must authorize us to say so. It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated."

U. S. vs. Wiltberger, 5 Wheat., 76, 95-6.

In Endlich on Interpretation of Statutes, the author, on page 455, says:

"Unless the proper meaning of the language of the statute brings a case within its letter, the rule of strict construction forbids the court to create a crime or penalty by construction, and requires it to avoid the same by construction; and, although the court may be unable to conceive any reason why the case in question should have been omitted, and considers it highly improbable that an omission was intended, it is not at liberty to extend the enactment to cases not included within the clear and obvious import of the language."

To the same effect, see:

Field vs. U. S., 137 Fed., 6, 8.

Bishop on Statutory Crimes, sections 220, 194, 190.

1 Wharton's Criminal Law (9th Ed.), section 28, pages 42-3.

Endlich on Interpretation of Statutes, section 330, page 456.

2 Sutherland on Statutory Construction, 966.

State vs. Beck (R. I.), 43 Atl., 366-8.

State vs. Walsh, 45 N. W., 721.

State vs. Krueger, 35 S. W., 604, 606.

State vs. Dailey, 107 N. W., 1094.

"* * * It can hardly be expected that the well-known requirements of certainty in the allegations of an indictment can be disregarded, and that the court will supply, by inference and argument, the defects or omissions in the indictment. * * * It is a fundamental doctrine in English and American law that there can be no constructive offenses; that, before a man can be punished, his case must be clearly within the law; the charge is to be unmistakably set forth in the indictment, and if there be uncertainty or *fair doubt* whether the law embraces the act, *or the indictment sufficiently charges the offense*, the doubt is to be resolved in favor of the accused."

In re Buell, 4 Fed. Cas., No. 2102, page 589.

In U. S. vs. Clayton, 2 Dill., 219; 25 Fed. Cas., No. 14814, Dillon, circuit judge, speaking for the court (Dillon, circuit judge, and Caldwell, district judge), on page 460, says:

"The principle that the legislative intent is to be found, if possible, in the enactment itself, and that the statutes are not to be extended by construction to cases not fairly and clearly embraced in their terms, is one of great importance to the citizen. The courts have no power to create offenses, but if, by a latitudinarian construction, they construe cases not provided for to be within legislative enactments, it is manifest that the safety and liberty of the citizen are put in peril, and that the legislative domain has been invaded. Of course, an enactment is not to be frittered away by forced constructions, by metaphysical niceties, or mere verbal and sharp criticism; nevertheless, the doctrine is fundamental in English and American law, that there can be no constructive offenses, that before a man can be punished his case must be plainly and unmistakably within the statute, and if there be any fair doubt whether the statute embraces it, that doubt is to be resolved in favor of the accused. These principles of law admit of no dispute, and have been often declared by the highest courts, and by no tribunal more clearly than the Supreme Court of the United States. U. S. vs. Morris, 14 Pet. (39 U. S.), 464; U. S. vs. Wiltberger, 5 Wheat. (18 U. S.), 76; U. S. vs. Sheldon, 2 Wheat. (15 U. S.), 119. And see, also, Ferret vs. Atwill (Case

No. 4747), Sedg. St. & Const. Law, 324, 326, 334; 1 Bish. Cr. Law, sections 134, 145."

"There is no rule of law better established than where, from a given state of facts, two opposite inferences may be drawn, that inference will be adopted which is lawful and honest, and not that which is unlawful and dishonest."

United States vs. Detroit T. & L. Co., 124 Fed., 393, 400.

"No man is presumed to do wrong or to violate the law, and every man is presumed to know the law."

U. S. vs. Budd, 144 U. S., 154, 163.

In Olson vs. United States, 133 Fed., 849, on page 853, the Circuit Court of Appeals for the 8th Circuit has considered the sufficiency of an indictment similar to our own; the court said in this connection:

"It is urged that the indictments were insufficient, in that they do not set forth facts sufficient to constitute a public offense. Much of the argument in support of this proposition is based upon the theory that the indictment should show an enforceable agreement, one good under the statute of frauds. This question we have already disposed of against such contention. In every other respect we think the indictment upon which defendant was convicted unassailable. *It charges the several defendants with having entered into a conspiracy. To do what? To defraud the United States* out of the title and possession of a large quantity of land in the district of Minnesota, a portion of which are specifically described. How was this fraud to be consummated? The indictment says by means of false, fraudulent, feigned, untrue and illegal entries of said lands under that certain act of congress approved June 3, 1878, etc. The indictment then charges the overt act, to wit, that Olson, Mahon and Agatin persuaded and induced Dwello, upon entering the land, in the United States Land Office at Duluth, Minn., to make a false oath, etc., specifying the particulars in which the oath was false. Thus it will be seen the indictment charges the unlawful combination, the illegal purpose to be attained, the means by which it was to be attained, and the overt act upon the part of some of the alleged conspirators. This, we think, sufficient. Dealy vs. United States, 152 U. S., 539; 14 Sup. Ct., 680; 38 L. Ed., 545."

No such language as that used in the indictment in the Olson case is used in the indictment in the case at bar.

In Commonwealth vs. Hunt, 4 Metcalf (Mass.), 126, it is said: Conspiracy is an offense which especially demands the application of that wise and humane rule of the common law that an indictment shall state, with as much certainty as the nature of the case will admit, the facts which constitute the crime intended to be charged.

In State vs. Mitchell, 25 Mo., 42, Judge Scott, in touching upon the effect of relaxing the strict rules of pleading in charging criminal offenses, delivered this forcible utterance:

"There is no policy in encouraging carelessness or laxity in criminal pleadings. When any departure from the required form is tolerated, it, instead of being regarded as a beacon to warn the pleader of danger, is instantly seized upon as a precedent, and urged as a reason why there should be greater relaxation of the rule requiring the observance of forms. In this way the courts will be led, step by step, to the subversion of all order in the administration of the criminal code."

II.

THE ALLEGED OFFENSE IS BARRED BY THE STATUTE OF LIMITATIONS.

The indictment alleges that the alleged conspiracy was formed on the 6th day of June, 1901, *which was more than six years before the indictment was returned.* In addition, 27 of the 68 alleged overt acts set forth in the indictment are alleged to have been committed in the year 1901, to wit, overt acts 1 to 9, both inclusive; 20 to 28, both inclusive, and 39 to 47, both inclusive.

The defendants, by their motions, plead the statute of limitations of three years as a bar to the prosecution, and each of the verified motions filed by defendants contains the following statement:

"The defendant, in support of and as a part of his motion to dismiss the cause and quash the indictment, because the in-

dictment was not found or returned within three years next after the alleged offense was committed, and in support of his claim that the prosecution against defendant is barred by the statute of limitations, further says: That during all of the times mentioned in the indictment, and at the time first mentioned, to wit, June 6, 1901, and ever since that time, the defendant has been a citizen and resident of the state of Colorado, and has, during said entire period of time, resided and lived and actually been in the state of Colorado, and he has never been a fugitive from justice in any way, nor has he ever, at any time, fled from justice, and that his whereabouts in the state of Colorado have never been concealed and were well known to the people of the state of Colorado and the prosecuting officers of the United States government. And defendant further says that he has never, at any time, left the district for the purpose of avoiding arrest, and he could have been easily apprehended or arrested had any indictment been found against him at any time since said 6th day of June, 1901. He further states that no information or criminal complaint of any kind was filed against him, and that he was not arrested until after the return of the indictment in this cause, which was returned on the 22d day of June, 1907."

(See pleading of defendant Caldwell, page 27 of Printed Record; defendant Hampton, page 38; defendant Taylor, page 46; defendant Hatcher, page 37; defendant Sloan, page 62; defendant Sullenberger, page 70.)

Counsel for the government did not file any denial of, or reply to, these allegations of fact, and on the hearing admitted their truth.

The court, in its opinion (see Printed Record, pages 76 to 82), quashed the indictment, without any statement as to why it was done, except to say that the reasons given by the court in the Biggs case (now No. 628 on the docket of this court), were applicable. Looking to the Printed Record in the Biggs case, No. 628, pages 42 and 43, we find that the court discusses the plea of the statute of limitations, raised also in the Biggs case, and, without holding directly that the plea of the statute of limitations is good, concludes the opinion as follows:

"Therefore, if we take the first view, the charge is duplicitous, and, if the second, prosecution of the offense is barred. The dilemma renders the indictment bad."

As before shown, the first order entered of record (page 73 of Printed Record) simply quashed the indictment. Thereupon, there being some question as to whether or not the simple quashing of an indictment would enable the government to get the case to this court by writ of error, the order of the court was changed to show also the sustaining of defendants' plea of the statute of limitations. Therefore, if the court's opinion is to determine whether or not the court held the alleged offense barred, it may well be said that the lower court did not sustain the plea. If, on the other hand, the court's second order determines the question, it would appear that the statute of limitations was held to be a bar.

At any rate we contend that the statute of limitations is directly applicable, and that the alleged offense was barred at the time the indictment was filed, it being alleged that the conspiracy was formed in 1901, and that overt acts were committed in 1901.

But counsel for the plaintiff in error will doubtless contend, as was contended in the lower court, that the allegations in the indictment that the conspiracy continued at all times from the 6th day of June, 1901, down to the date of the return of the indictment in 1907, and that overt acts were committed within three years from the date of the return of the indictment, renders ineffective the defense of the statute.

Let us examine this question for a few moments.

The indictment says that an offense was fully and completely committed—i. e., the plan was formed and overt acts done in furtherance thereof—in 1901. It also says that the defendants kept on conspiring and kept on committing overt acts down to the time the indictment was returned.

The learned judge of the lower court says, in the Biggs case (No. 628), that the evident purpose of the pleader was "an attempt to toll the limitation of the statute."

It must be clear that the indictment seeks to have defendants punished for acts alleged to have been committed more than three years before the indictment was returned, on the theory that because they kept on in the same course of conduct they are not entitled to the benefit of the statute of limitations.

We submit that this is a remarkable contention, and one that, in effect, would nullify the statute.

We submit that it cannot be justly said that the indictment seeks to punish the defendants *only* for what has occurred within three years. If such was the theory there was no necessity of mentioning anything back of some specific date within three years.

Before discussing further the question of whether or not the statute applies to the indictment now before the court, we desire to call attention to the following authorities as to how statutes of limitations are regarded.

In Leffingwell vs. Warren, 67 U. S.; 2 Black, 599; 17 L. Ed., 261, it is said:

"Statutes of Limitations are now regarded favorably in all courts of justice. They are 'Statutes of Repose.' Usually they are founded on a wise and salutary policy and promote the ends of justice."

In Lewis vs. Marshall, 5 Peters, 470, the court says:

"Statutes of Limitations have been emphatically and justly denominated 'Statutes of Repose.'"

In Wharton's Criminal Pleading and Practice, article 316 (8th Ed.), it is said that statutes of limitations are to be liberally construed in favor of accused persons.

Mr. Bishop, in his work on Statutory Crimes, at section 259 says:

"Whether the construction of a civil statute of limitations is to be strict or liberal, a question on which there is no absolute harmony of opinion, that of a criminal one is plainly in principle to be liberal, because it is a provision in favor of the accused, and we have seen that this sort of a provision is to receive a highly liberal construction."

Now let us consider the principal decisions applicable to the question now before the court.

In U. S. vs. Hirsch, 100 U. S., 33, it is held that the three years statute of limitations applies to a charge of conspiracy to defraud the United States.

In U. S. vs. Irvine, 98 U. S., 450, the court says:

"There is in this but one offense. When it is committed, the party is guilty, and is subject to criminal prosecution, and from that time, also, the Statute of Limitations applicable to the offense begins to run."

In the Irvine case the alleged offense consisted in withholding money which, if withheld at all, had certainly been continuously so withheld up to the time of finding the indictment, so that the allegations of the indictments now under consideration as to the continuousness of the alleged conspiracy would have applied as well in that case.

In Commonwealth vs. Bartilson, 85 Pa. St., 482 (1877), the Supreme Court of Pennsylvania had before it an indictment charging a conspiracy to defraud. The conspiracy was not laid in the first count within the statutory period, but a series of acts, some within the statutory period, were alleged, "in pursuance and as a renewal of such conspiracy." The trial court cited the case of Gise vs. Commonwealth, 31 P. F. Smith, 428, and held the offense barred, saying:

"We take the language of the Supreme Court as a solemn warning, that we are not, by applying the doctrine of continuous offenses, and setting up a new conspiracy with each successive overt act, to take down the bar of the statute and open a door which the law has closed."

The Supreme Court said:

"The difficulty in regard to this count arises merely from a mistake in pleading. *The date of the conspiracy should have been laid within the statutory period.* The commonwealth must allege and prove a conspiracy within two years. If this can not be done the commonwealth has no case. The pleader evidently felt the strain of this part of his case when he introduced the averment that the overt acts were in 'renewal' of the original conspiracy. It was practically laying an offense with a *continuando;* it was an attempt to prove the existence of a crime within the statutory period, by showing its commission outside

of such period, and that it had been continued down to a time within it. In a recent case in which I delivered the judgment of the court (Gise vs. Commonwealth, 31 P. F. Smith, 428) the doctrine was asserted that there is no such thing as a continuing offense; that it is wholly unknown to the criminal law. This language has been somewhat criticised, in view of which I have reconsidered it carefully, with a view to withdraw or qualify it if found erroneous. Next to being right, nothing would afford me more pleasure than to correct an error. In order to interpret its true meaning, the passage must be considered in its connection. The question before us was whether a man who had been indicted in 1876 for bigamy committed in 1868 could be convicted by showing that he had continued the offense during the intervening years by cohabitation with the second woman. It was held that he could not, and that there was no such thing as continuing a completed offense so as to toll the statute. It was not intended to assert the absurd proposition that a man might not repeat an offense from day to day, as in the case of maintaining a nuisance, and other familiar instances which might be referred to. This may be done daily for any indefinite period. But a man could not be convicted of maintaining a nuisance charged to have been committed ten years prior to the finding of the bill of indictment by proving that he had continued the nuisance, day by day, to a time within the statutory period. In the sense, therefore, of tolling the statute, it can not be said that a completed offense can be continued. It may be repeated from day to day, but the statute runs from the close of each day, and the indictment must charge the offense to have been committed within the statutory period. This is all that was intended to be said in Gise vs. Commonwealth; it was all that the language referred to implies when read in connection with the subject-matter to which it refers. In this sense the doctrine of that case is reasserted.

"We think the learned judge of the court below was right in quashing the first count."

In U. S. vs. Owen, 32 Fed., 534 (1887), the indictment charged a conspiracy formed six years before the indictment was returned. It also charged acts done in pursuance of the conspiracy within three years. The statute of limitations was interposed. The prosecution contended that the crime was a "continuous" one. Judge Deady sustained the defendant's contention, on the ground that, when the conspiracy was formed

and an act done, an indictment would lie, and that after three years the bar is complete.

In U. S. vs. McCord, 72 Fed., 159 (1895), the indictment was returned within three years of the alleged date of the conspiracy. At the trial, after the evidence was introduced, a motion was made by defendants for a directed verdict, on the ground that the prosecution was barred by the statute of limitations. The court discharged the defendants, holding that the evidence showed that the conspiracy was formed and overt acts committed more than three years before the indictment was returned. The court held the offense not to be a continuing one in the sense of the statute beginning to run anew from the time of the commission of every overt act.

In Am. Fire Ins. Co. vs. State, 22 So. Rep., 99 (Miss.), (1897), the court said:

"If this indictment presented the original conspiracy as and when first formed, and that conspiracy was so originally formed more than two years before the finding of the indictment, the prosecution would, of course, be barred."

The court further held that the indictment under consideration was for a conspiracy formed in two years. The court quotes with approval the ruling in Com. vs. Bartilson, 85 Pa. St., 487, that the date of the conspiracy should be laid within the statutory period.

In U. S. vs. Greene, 100 Fed., 941 (1900), one count of the indictment alleged a fraudulent scheme formed more than six years before the indictment was returned, which was further alleged to have been "in continuous process of execution until October 1, 1897." The court held this to be "only a pleader's device to avoid the effect of the statute of limitations." The court further held that "each new overt act becomes in law a new conspiracy," and that the time of the conspiracy may be laid within the three year period, if the overt act was within that period, "the prior combination, if established, and the later overt act being evidence from which a jury may infer the new conspiracy."

The remark of the court as to the "continuing crime" theory being merely the pleader's device to avoid the effect of

the statute of limitations, is certainly directly applicable to the case at bar.

In *Ex parte* Black, 147 Fed., 832 (1906), a writ of habeas corpus involved the validity of an indictment for a conspiracy to defraud which was alleged to have been formed more than three years before the return of the indictment. The court says:

"It is apparent from the evidence that the cause of action set out in the indictment is barred by the statute of limitations. By section 1044, Rev. St. (U. S. Comp. St., 1901, page 725), congress has declared:

"'No person shall be prosecuted, tried or punished for any offense * * * unless the indictment is found * * * within three years next after such offense shall have been committed.'

"Judge Bunn, in United States vs. McCord (D. C.), 72 Fed., 157, says:

"'I have no doubt that the statute of limitations has stood in the way of this prosecution from the first, and that counsel for the government have felt the difficulty.'

"This language seems to fit the case at bar, and to explain some eccentricities of the pleader. When was this offense committed, and when did the three years begin to run? The indictment avers that the conspiracy was formed in September, 1902, to bring about the fraudulent entry of certain lands therein described. The filing of the necessary affidavits on the 7th and 8th of October, 1902, must have set the statute running, because it was an open act on the part of the defendants to effect the purpose of the conspiracy. Therefore, according to the general precepts of the law, the action would be barred on the 8th day of October, 1905. The indictment in this case was found on the 3d day of April, 1906. To escape this dilemma the pleader has been driven to skillful fencing and adroit expedients."

The court further holds that if the illicit scheme is continued and new overt acts to carry it out occur within the period of limitations, "*the pleader should charge a new conspiracy.*" The court cites, with approval, the cases we have already noticed, of U. S. vs. Owen, and U. S. vs. McCord.

In U. S. vs. Bradford, 148 Fed., 413 (1905), each count of the indictment charged the conspiracy to have been formed

within three years. The court held that the moment an overt act is committed the statute begins to run against the conspiracy and that overt act, but that if the conspiracy is afterwards renewed, and another act is done, that conspiracy and overt act may be prosecuted within three years. The judgment of the court was affirmed in 152 Fed., pages 616, 617.

It will be noticed that the indictment in the Bradford case did not attempt to charge the defendant with, or to have him punished for, an offense committed more than three years before the indictment was returned. On the contrary, it specifically charged only an offense committed within three years. In this it is different from the indictment in the case at bar.

In U. S. vs. Brace, 149 Fed., 874 (1907), (De Haven, district judge), the indictment was returned three and one-half years after the time stated therein on which the conspiracy was formed. (The date stated in the opinion as to the indictment being returned in *1906* is a mistake. It should have been *1907*.) To avoid the plea of the statute of limitations the indictment stated that from the time of its formation, "and until and including the times hereinafter alleged," the conspiracy "was continuously in process of execution," and that defendants "continued during said times to knowingly, falsely and unlawfully to conspire," etc. A demurrer to the plea of the statute of limitations was sustained, the court holding that the charge in the indictment was but a single charge, and might be said to be a continuing one, as long as it was in process of execution. The court concludes its opinion as follows: "There can be but one prosecution, based upon a single conspiracy, and this *is not barred as to any overt act within the statutory period.*"

Just what is meant by this statement is not very clear. The learned judge says that the offense is not barred as to any overt act within three years, which would seem to indicate that the court thought the prosecution was for the doing of a certain act, rather than for the formation of a conspiracy. Probably, however, the court means that a conspiracy formed more than three years before indictment is not barred, where, within three years, an overt act in furtherance of it is committed.

In Ware vs. U. S., 154 Fed., 577 (1907), the indictment alleged a conspiracy formed within three years. No mention was made of anything back of that period. The evidence showed that a conspiracy was formed and overt acts committed more than three years before the indictment was returned. It also showed that acts were committed within three years. The Circuit Court of Appeals for the Eighth Circuit, speaking through Mr. Justice Sanborn, said:

"Where the conspiracy was formed and an overt act was done in pursuance of it more than three years prior to the indictment, and overt acts were subsequently done in the execution of it within the three years, may one of the conspirators be successfully prosecuted for it? The question is answered in the negative in U. S. vs. Owen (D. C.), 32 Fed., 534; U. S. vs. McCord (D. C.), 72 Fed., 159, 165, and in Ex parte Black (D. C.), 147 Fed., 832, 841. It is answered in the affirmative in U. S. vs. Greene (D. C.), 115 Fed., 343, 347, 349, 350; U. S. vs. Greene (D. C.), 146 Fed., 803, 889; Lorenz vs. U. S., 24 App. Cas. Dist. of Columbia, 337, 387; U. S. vs. Bradford (D. C.), 148 Fed., 413, 416, 419; U. S. vs. Brace (D. C.), 149 Fed., 874, 876; Commonwealth vs. Bartilson, 85 Pa., 482, 488; People vs. Mather, 4 Wend. (N. Y.), 259; 21 Am. Dec., 122; American Fire Ins. Co. vs. State, 75 Miss., 24, 35; 22 South., 99, 102, and Ochs vs. People, 25 Ill. App., 379, 414. After a careful reading and consideration of these and other authorities, our conclusions are that the true answer to this question is that the existence of the conspiracy and the conscious participation of the defendant therein within three years are indispensable to the maintenance of such a prosecution; but that, if these facts are established by competent evidence, such a prosecution may be sustained. Proof of the formation by the defendant and others, more than three years before the indictment, of such a conspiracy as that charged in the indictment under which an overt act has been done prior to the three years, is insufficient to sustain the charge of a conspiracy within the three years. But in connection with evidence aliunde of the existence of the same conspiracy, and of the defendant's conscious participation therein within the three years, it is competent evidence for the consideration of the jury in determining the issue presented by the indictment. An overt act committed by one of the alleged conspirators within the three years pursuant to a conspiracy between him and the defendant, formed and followed by an overt act more than three years

prior to the filing of the indictment without the defendant's consent or agreement within the three years to the continued existence and to the execution of the conspiracy, is incompetent to establish its existence and his participation therein within the three years."

"The offense under section 5440 is the conspiracy, not the conspiracy and the overt act. 'The provision of the statute,' says the Supreme Court, 'that there must be an act done to effect the object of the conspiracy, merely affords a locus penitentiæ, so that before the act done either one or all of the parties may abandon their design, and thus avoid the penalty prescribed by the statute.' U. S. vs. Britton, 108 U. S., 199, 205; 2 Sup. Ct., 525; 27 L. Ed., 703. So that there is a locus penitentiæ after the performance of each overt act and a presumption of the innocence of the defendant, and if, after the performance of the first overt act, a defendant abandons the design of the conspiracy, and the prosecution of the conspiracy and of the first overt act becomes barred by the statute, the overt acts of other conspirators within the three years in the performance of the old conspiracy without the conscious participation of the defendant ought not to charge, and cannot charge, him with the offense, because they fail to evidence his intent to violate the law within the three years.

"On the other hand, the offense denounced by section 5440 is not the mere formation, but the existence, of the conspiracy and its execution. And if by the agreement, or by the joint assent of the defendant and one or more other persons, within the three years, the unlawful scheme of the conspiracy is to be prosecuted, and an overt act is subsequently done to carry it into execution, the mere fact that the same parties had conspired and had wrought to accomplish the same or a like purpose, more than three years before the filing of the indictment, ought not to constitute, and does not constitute, a defense to the charge of the conspiracy within the three years.

"The same rules of law and of evidence govern the trial and the decision of the issue whether or not the defendant jointly with others consented or agreed within the three years to the existence of the conspiracy and the subsequent execution of its scheme which control the trial of the issue, whether or not the conspiracy was originally formed, where that is the crucial question. Evidence must be produced from which a jury may reasonably infer the joint assent of the minds of the defendant and of one or more other persons within the three years to the existence and the prosecution of the unlawful enterprise. Until such evidence is produced, the acts and admissions

of one of the alleged conspirators are not admissible against any of the others unless the court in its discretion permits their introduction out of their order. But where evidence has been produced from which the joint assent of the defendant and one or more other persons within the three years to the existence and execution of the conspiracy may reasonably be inferred by the jury, then any subsequent act or declaration of one of the parties in reference to the common object which forms a part of the res gestæ, may be given in evidence against one of the others who has consented to the enterprise. And the joint assent of the minds of a defendant and others within the three years to the existence and execution of the conspiracy may be found by the jury like any other ultimate fact as an inference from other facts proved. Drake vs. Stewart, 22 C. C. A., 104, 107; 76 Fed., 140, 143."

It will be noticed that no question of pleading was involved in the Ware case. The indictment described the offense as having been committed at a time within three years, and made no mention of any prior conspiracy. The court holds that conspiracies formed and acts done more than three years before the return of an indictment *are forever barred*. In other words, the "continuing crime" theory is emphatically repudiated.

In U. S. vs. Barber, 157 Fed., 889 (1907) (Quarles, district judge), the indictment alleged the conspiracy to have been formed more than three years before the indictment was returned, and that it had been continuously in process of execution. The indictment also alleged that overt acts in furtherance of the conspiracy had been committed within three years. The court intimates that the indictment is good, but does not so decide, saying that the matter must be passed upon by the judge of the district to which the prisoner was being sought to be removed. The court cites the Ware case, *supra*, and says:

"This case may be said to be an innovation in the law, but it is a well reasoned and instructive case."

In U. S. vs. Lonabaugh, 158 Fed., 314 (1907), the syllabus to the opinion of District Judge Riner, on the hearing of the motion for a new trial, recites that the offense "was not complete until the final receipts held by defendants were surrendered and patents obtained, from which time only the statutes

of limitations began to run." The opinion, however, does not use the remarkable language that the offense is not complete until the last act in pursuance of the conspiracy is done. It does, however, say that the surrender of receipts and the taking and recording of patents must be held to be acts to effect the object of the conspiracy, and as these acts occurred within three years, it cannot be said that the statute had run. The opinion does not show that any question as to the sufficiency of the indictment was involved, and we assume that the indictment laid the formation of the conspiracy within three years, and did not mention anything that had occurred more than three years before its return.

In U. S. vs. Black, 160 Fed., 431 (1908), the Circuit Court of Appeals for the Seventh circuit had before it by appeal the case heretofore noticed, which was reported as *Ex parte* Black, 147 Fed., 832, and in which case the indictment alleged a conspiracy formed more than three years before the return of the indictment. The lower court's ruling, holding that the indictment was subject to the plea of the statute of limitations, was affirmed.

The opinion concludes as follows:

"The contention that the object of the conspiracy was not completed until a patent was issued and delivered is untenable, as we believe, in any view of the effect of the final entries and certificates of purchase thereunder, for the twofold reasons, that violation of the statute (a) in nowise depends upon the success of the conspiracy, and (b) became complete (as before stated) when the final step was taken on the part of the conspirators. What course has been or may be adopted by the land office or other departments in reference to these entries, or in issuing or withholding the formal patents thereupon, is plainly immaterial under this indictment. The general doctrine in reference to public lands subject to entry appears to be settled that a tract 'ceases to be subject to the disposal of the United States' when it is entered, paid for, and so certified by the land office, although no patent has been delivered (Cornelius vs. Kessel, 128 U. S., 456, 460; 9 Sup. Ct., 122; 32 L. Ed., 482, and United States vs. Schurz, 102 U. S., 378, 396; 26 L. Ed., 167; 9 Rose's Notes, U. S., 1091); but the

status of entries made as averred in the indictment is neither involved nor proper for comment in this opinion.

"The orders appealed from are affirmed."

In Jones vs. U. S., 162 Fed., 418 (1908), the indictment charged the formation of a conspiracy at a time which was within three years of its return. The evidence showed that the conspiracy was formed more than three years before the indictment was returned. Overt acts were proved to have occurred more than three years before the indictment was returned, and also within the three-year period. The defendants raised the question of the statute of limitations by objections to evidence and by requests for instructions. The court holds that "each overt act gives a new, separate and distinct effect to the conspiracy and constitutes another crime."

It will be noticed that the court does not indorse the theory that the old offense could be prosecuted. It will also be noticed that no question of pleading was involved, as the old offense was not mentioned in the indictment. The court approves of the decision in the Ware case, *supra*.

It will also be noticed from the different decisions that a great variety of opinions exist as to the applicability of the statutes of limitations to a charge of a conspiracy; that some of the courts hold that when a conspiracy is formed and an overt act done, the statute begins to run, and that after the lapse of three years there can be no prosecution, no matter how many overt acts are later done under the original conspiracy. Other cases, as we have seen, hold that the statute only begins to run from the doing of the last overt act, and that the offense is a continuing one, while still others repudiate entirely the doctrine of a continuing offense.

We believe that much of the difficulty in arriving at a decision of this much-discussed question will be removed by clearly bearing in mind what this court has said in several cases as to the nature of the offense of conspiracy.

In Pettibone vs. U. S., 148 U. S., 196, 202, it is said:

"The confederacy to commit the offense is the gist of the criminality."

In U. S. vs. Britton, 108 U. S., 199, it was also said:

"The offense does not consist of both conspirary and the acts done to effect the object of the conspiracy, *but of the conspiracy alone.*"

In Dealy vs. U. S., 152 U. S., 539, 547, it is said:

"The gist of the offense is the conspiracy.
"If the conspiracy was entered into * * * the crime was then complete."

This court also, of course, held, in the cases mentioned, that while the offense was complete, the statute of the United States did not permit a prosecution therefor until some act was done in furtherance of the conspiracy, and as was said in the Dealy case, this "merely affords a *locus penitentiae*, so that before the act done either one or all of the parties may abandon their design, and thus avoid the penalty prescribed by the statute."

Bearing in mind these declarations of the court, it would appear to be clear that as soon as a conspiracy is formed and an act done thereunder, a prosecution may be instituted. It must necessarily follow that when three years have elapsed, there can be no prosecution initiated for what might have been prosecuted three years before that time. To hold otherwise would, it seems to us, absolutely nullify and destroy the statute of limitations. For a court to say that the offense of conspiracy is a continuing offense so that the statute of limitations does not apply is only another way of saying that while the statute of limitations says it applies to *all* offenses, the court will make an exception as to *one* offense.

Now let us consider for a moment the indictment in this case. It is alleged that in 1901 the defendants conspired to obtain a certain specified twenty-nine hundred and ninety acres of land, and in the same year they committed twenty-seven open overt acts in pursuance of their conspiracy. The government could have prosecuted for that conspiracy over six years before it did have an indictment returned. If it could have done so, the law is, we submit, that it must have done so. We submit that this prosecution was forever barred by the failure to have

an indictment returned within three years after the first overt act was committed, which is alleged to have been June 6, 1901.

But it may be said that these defendants kept on conspiring and agreeing together down to a time within the three-year period. If so, it may well be said that they renewed their old conspiracy. If they renewed it—if, within three years, their minds again met and they agreed again together to do an unlawful thing—that, of course, would be the formation of a conspiracy for which they could be prosecuted. As the old offense was dead, their offense could not be said to be a continuing crime in the sense that the old and barr rime still existed for the purpose of punishment. It would be a new crime, not a "continuing offense." An indictment for this new crime, for this new "breathing together," would, in our judgment, undoubtedly lie. How should an indictment, under such circumstances, be drawn? Should it recite the original conspiracy, dead and buried, as we have shown, by the statute of limitations, and then, on the theory of a continuous crime, simply say, as does the indictment in the case at bar, that the defendants had kept on conspiring down to the day the indictment was returned? Why the necessity of mentioning at all in the indictment the old offense? If the old offense is set forth at all, how can we escape the conclusion that what is sought by the pleader is to prosecute for that which is barred? We submit that the court will be driven to conclude that the indictment in this case seeks to punish defendants for acts done over three years before the indictment was returned, on the theory that when parties continue to conspire within three years of the return of an indictment, their original crime is not dead, but continues to exist.

We submit that a just and fair rule is laid down by the Circuit Court of Apppeals for the Eighth circuit in the Ware case, *supra*, and that an indictment cannot be successfully drawn on the "continuous crime" theory, and that to escape a plea of the statute of limitations, the indictment must allege the formation of a conspiracy within the three years, as was done in the Ware case, in the Jones case, and in other cases to which we have called attention.

III.

DUPLICITY.

The defendants by their motions contended that if the indictment charged any offense at all, then it was subject to attack on the ground of duplicity.

It is, of course, an elementary principle that an indictment, like the one in this case, consisting of only one count, cannot charge more than one offense.

As before shown, a number of courts have declared that each overt act constitutes a "*new, separate and distinct offense.*" If this statement is correct, then there are necessarily sixty-eight separate and distinct offenses charged in one count of this indictment, because there are sixty-eight overt acts charged, and the indictment is bad for duplicity. But we do not believe that the statement is correct. It is a mistake to say, as did Judge Ross in the Jones case, *supra*, that each overt act constitutes a *new, separate and distinct offense.* The offense is the agreeing together, and not the doing of any overt act or acts. So that we may admit that personally we do not believe that there are sixty-eight separate and distinct offenses charged in this indictment. We have the right, however, to contend, and we do contend, that if the theory of each overt act constituting a separate and distinct offense is to have any force or effect, then it logically follows that this indictment is bad for duplicity. Again, we say that if any offense within three years is charged in this indictment, then the indictment is necessarily bad for duplicity, because this would mean that two offenses are charged in one count, to wit, an offense committed more than three years before the indictment was returned, and an offense committed within three years of the return of the indictment. We quote from the syllabus in the Ware case, *supra*:

"Where a conspiracy has been formed and an overt act has been done in execution of it more than three years before the filing of an indictment, a prosecution for that conspiracy and overt act is barred by the statute of limitations."

This language is applicable here because the indictment now under consideration charges a conspiracy and overt acts more than three years before the indictment was returned. If, therefore, it can be said that there is also a charge of an offense within three years, then there are necessarily two offenses charged in one count.

We do not find that this question of duplicity has been presented, or commented upon, in any of the cases which we have mentioned, save and except in the case of Com. vs. Bartilson, 85 Pa. St., 482, 487. It is there said that it is a well settled rule of criminal pleading that distinct offenses cannot be joined in the same count. The court condemns the attempt to set up in one count an offense barred by the statute of limitations, and, in the same count, to plead a renewal of the original conspiracy, or the attempt to lay an offense with a *continuando*.

We contend that if the government now insists that each overt act constitutes a new and distinct offense, then its indictment contains sixty-eight offenses in one count, and that if, on the other hand, it contends that it contains a charge of an offense wihin three years, then its indictment contains at least two offenses in one count. In either event the indictment is bad.

All trouble and bother about such matters can be settled by the laying down of what we deem to be a simple and just rule, viz., that if the government desires to prosecute a conspiracy it must lay the date thereof and an overt act within a period of three years, thereby constituting an unassailable indictment. Then, on the trial, if it desires to do so, it can introduce evidence of the old and outlawed conspiracy for the purpose of aiding the jury in determining whether or not such a conspiracy existed within three years of the return of the indictment. If, under such circumstances, a jury is clearly warned by the trial court that it cannot find a verdict of guilty based on the offense, if any, committed more than three years before the indictment was returned, and that evidence of the alleged former conspiracy was permitted to be introduced only for the purpose of aiding in determining whether or not the

conspiracy existed within three years, we cannot see how any wrong can result either to the prosecution or to a defendant.

In other words, we believe that all that is necessary to be done to clear the atmosphere with reference to this much discussed question is to affirm the doctrine of the Ware case, and to add that an indictment to be free from attack must, like the Ware indictment, lay the date of the offense within three years.

V.

UNCERTAINTY AND INDEFINITENESS.

In addition to the other attacks made on the indictment, the motions filed by defendants attack the indictment for indefiniteness and uncertainty.

We will now call attention to some of the matters complained of.

First. It is claimed by the prosecution that the indictment charges that an offense was committed within three years of the return of said indictment. It is an elementary proposition of law that in criminal pleading, as well as in civil pleading, there must be certainty as to the time a thing is alleged to have been done. It is necessary that an indictment fix a definite date, although, of course, it is not necessary that the proof in a criminal case show that an offense was committed on the exact date laid in the indictment. If the indictment in this case charges, or attempts to charge, an offense within three years, it is bad for uncertainty, in that it does not fix the time within three years when the alleged conspiracy was entered into. It says that the alleged conspirators agreed on June 6, 1901, and continuously at all times down to the return of the indictment.

In other words, the illogical and absurd statement is made that at every moment of time for six years the alleged conspirators renewed their alleged illegal agreement. We submit that such an allegation violates every rule of pleading. We submit that this court should, if it holds that it has jurisdiction of

this writ of error, announce the rule to be that, in order to constitute a valid indictment, a definite date within three years must be stated in the indictment, just as was done in the Ware case, and in some of the other cases to which we have called attention.

We do not find that this question as to certainty of time was ever presented to, or considered by, the courts, which have held that an indictment on the continuous crime theory is proper.

Second. The indictment is uncertain and insufficient as to what lands were embraced in the conspiracy. We do not mean to contend that it is necessary, in every case of a conspiracy to defraud the United States of its lands, to describe the lands. It may well be that when a conspiracy is formed the conspirators may not have in mind, and the agreement may not embrace, any particular lands, but that thereafter, from time to time, lands are selected and obtained under the conspiracy. In such a case, of course, it would not be possible to allege a conspiracy to obtain certain specifically described lands. But that is not this case. Here, according to the indictment, the agreement was confined to certain lands, and an attempt is made to specify them. Yet, in doing so, the indictment is so defective, uncertain and contradictory, that it can not be told what lands were embraced in the alleged conspiracy. The indictment says that the conspiracy was to obtain twenty-nine hundred and ninety acres of timber land, in excess of lands that the corporation could lawfully obtain directly from the United States, descriptions of which said lands, it is said, are set forth in that part of the indictment where defendants are charged with having procured the execution and certification of certain documents, entitled "Testimony of Claimant" * * * "being overt acts numbered one to eighteen, both inclusive."

Looking to the overt acts charged in the indictment, we find that nineteen different tracts are described, and nineteen different people are alleged to have been procured to make proof. It is impossible to tell what lands are intended to be embraced in the charge. While the pleader says, in one breath,

that he charges the fraud to embrace only the lands mentioned in overt acts one to eighteen, he also charges the procuring of another person to make final proof as to an entirely different tract. Then the indictment winds up with an allegation that defendants conspired to obtain "certain" of the public lands and property of the United States, without any description at all.

We submit that by reading the indictment it will be found that it is not sufficiently certain or definite in the respect mentioned. Taking all of the lands mentioned in the indictment, including the lands mentioned in overt act nineteen, they do not aggregate twenty-nine hundred and ninety acres.

Third. The indictment is uncertain and indefinite, in that, while certain documents are referred to in overt acts one to nineteen, inclusive, they are not set out, and there is no allegation as to the contents of such documents.

The rule is thus stated in Baver vs. State, 14 Tex. App., 332, 337:

"As a general rule, whenever an instrument in writing enters into an offense as a part or basis thereof, or when its proper construction is material, the instrument should be set out in the indictment."

In United States vs. Watson, 17 Fed., 145, the charge was conspiracy, under section 5440, to commit a crime against the United States. In charging the overt act, as in the cases at bar, the indictment referred to a certain written document without setting the same forth in *hacc verba;* the court, holding the indictment insufficient by reason thereof, said:

"By all rules of pleading, criminal as well as civil, when a written document is relied on to sustain the prosecution or plaintiff's case it must be set out either *verbatim* or in substance, and not a statement of the opinion of the pleader as to the effect it was intended to or might produce. The information does not undertake to give the substance of the document mentioned, but only its effect. I am of opinion that this is not sufficient, especially in a criminal charge."

See, also:

1 Bishop's New Crim. Procedure, section 332, subdivision 4.

Pooler vs. U. S., 127 Fed., 509, 517-18.

We submit that for the reasons given the indictment is bad for uncertainty and indefiniteness.

VI.

THIS COURT HAS NO JURISDICTION AND THE WRIT OF ERROR SHOULD BE DISMISSED.

In Giles vs. Teasley, 193 U. S., 146, 160, it is said:

"In every case which comes to this court on writ of error or appeal, the question of jurisdiction must be first answered, whether propounded by counsel or not."

The act of congress of March 2, 1907, under which this writ of error is prosecuted, provides that a writ of error may be sued out on behalf of the United States in a criminal case in the following instances:

"From a decision or judgment quashing, setting aside or sustaining a demurrer to any indictment or any count thereof, where such decision or judgment is *based upon the invalidity or construction of the statute upon which the indictment is founded.*

"From a decision arresting a judgment of conviction for insufficiency of the indictment, where such decision is based upon the invalidity or construction of the statute upon which the indictment is founded.

"From the decision of judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy."

We present the following propositions in support of our contention that this court should now dismiss the writ of error:

(1) That the decision of Judge Lewis quashing the indictment was not based upon the invalidity or construction of

the statute (section 5440), upon which the indictment is founded, and hence this court has no jurisdiction under the first paragraph of the statute above quoted.

(2) That the written opinion or decision of Judge Lewis in this case shows that the court did not sustain any special plea in bar of the defendants, and that when the opinion of the lower court is before this court and so shows, then this court has no jurisdiction simply because of an order afterwards gotten to be made by the government carrying the judgment of the court further than the court's opinion in order to allow a writ of error to be sued out.

(3) That even if the court did sustain the defendants' plea of the statute of limitations, still it also held the indictment bad and quashed it on grounds which allow no writ of error to this court, and this being true, its action holding the plea good was unnecessary and furnishes no ground for a writ of error. In other words, the court's action sustaining the motion to quash was final and no writ of error can be sued out as to that part of the ruling. It therefore would be an idle thing for this court to attempt to determine whether or not a plea in bar also passed upon, was or was not well taken.

Now, let us apply these propositions to the facts of the case at bar.

A reading of Judge Lewis' opinion in this case, and of the opinion in the Biggs case (No. 628 on the docket of this court, also reported in 157 Fed. Rep., page 264), will show that the court's "decision or judgment" is not "based upon the invalidity or construction of the statute upon which the indictment is founded."

The court first recites the contents of the indictment. Then follows a statement of the provisions of the "timber and stone" act. The court then finds that no offense is charged by the language used in the indictment, in that the indictment "sets in where the second section of the timber and stone act leaves off," or, in other words, that the indictment did not charge that anything was done or contemplated to be done in advance of an applicant under the timber and stone act having in good fath made his application. The court did not in the slightest hold

or intimate that section 5440, on which the statute was based, was invalid. It did not anywhere base its opinion upon a construction of said statute. The statute needs no construction and was given none. The court simply held that the indictment only stated things agreed to be done by the alleged conspirators which were legal to be done. If the court's ruling quashing this indictment can now be reviewed, then we submit that there is no case where an indictment is quashed, that is not subject to be brought to this court by writ of error, because in every case the court must, to some extent, refer to the statute on which the indictment is based. It is clear from the statute that congress did not intend to permit a review of every order of a court quashing an indictment.

Where the decision quashing the indictment is based simply on defects in the pleading, there can be no review. This indictment was attacked on several grounds, among others that it was bad for duplicity. Judge Lewis says, as to this objection, "It would therefore appear that this objection is well taken." How can it be said that this ruling involves any construction of section 5440? We submit that it does not.

Let us consider for a moment the object of the statute permitting a review of a court's ruling quashing an indictment in certain cases. It could not, of course, ever have been the desire of congress, or any one, that this court should be bothered with reviewing *all* cases where indictments are quashed. Many indictments are quashed on account of the mistakes of the pleader. No one would think of having a statute passed requiring the court to take up and determine all such cases. But there are two classes of cases where indictments are quashed, in which it has been, and is, highly desirable that the decision of a nisi prius judge should not be final. One of these is where a trial judge declares invalid a solemn act of congress, and quashes an indictment for such a reason. In such a case it is highly important that our great government should have the right to present the question of the nullification of its legislative act to the highest court in the land. The other class of cases is where a criminal statute is open to doubt as to its meaning. As to such a statute conflicting decisions are liable

to be, and as a matter of fact are, rendered. One nisi prius judge holds one thing, and another rules differently. It is highly important, where different constructions can be put upon a statute, that the government, upon one of its indictments being quashed, should have the right to take the case to that court which is the final arbiter as to all questions submitted to it, and there have it forever determined just what the statute does mean. In both of these classes of cases the government has had no remedy until the act of 1907 was passed. It was to afford a remedy in just such cases that the 1907 statute was enacted. It was never intended that this court should consider the question of whether criminal pleadings in all cases were good, bad or indifferent. It was intended that where an indictment was quashed, because of the courts holding that the statute on which it was founded was invalid, or because of some construction which the court placed on the statute on which it was founded, then, that this court could be appealed to, to determine whether or not the court's ruling was correct.

We submit that when this court is appealed to by the government in a criminal case, it must, to sustain its appeal, say to the court, either that the lower court held invalid a solemn act of congress, or that the court construed the statute on which an indictment was founded in such a way as required the indictment to be quashed.

Now, take the case at bar. The defendants did not attack the validity of any statute, and Judge Lewis did not hold any statute invalid. The defendants did not ask for the construction of the statute (section 5440) on which the indictment was founded, and Judge Lewis did not construe said section. That section needs no construction. It is perfectly plain, and there is no diversity of opinion as to its meaning.

What, then, did the defendants ask of the court, and what did the court do? Why, they asked the court to consider the indictment and determine whether or not it charged any offense, and if it was determined that it did charge an offense, then to determine whether or not a simple rule of pleading forbidding duplicity had been violated. These were the questions passed upon by the lower court. As to the first proposition,

the court announced in its opinion that no offense was charged. As to the second question, i. e., duplicity, the court announced that the point appeared to be well taken. How, then, can it be contended, seriously, for one moment, that the indictment in this case was quashed because of some construction placed by the court on section 5440? But it may be said that the mere holding of a pleading, to be a bad pleading, may well involve a construction of the statute on which it is founded. That is undoubtedly true in some, and perhaps in many, cases. If the district attorney contends that the statute on which an indictment is founded means one thing, on which theory the indictment is good, and the defendants' attorney contends for another theory as to the meaning of the statute, on which theory the indictment is bad, and if there is a fair ground for debate, it must necessarily mean that the judge hearing and determining the question necessarily construes the statute. In such a case, if the indictment is quashed, then certainly a writ of error lies.

But in this case there was no dispute as to the construction of section 5440, and there is now no dispute. The meaning of section 5440 was not disputed by any one. This court, to reverse Judge Lewis, would be compelled to say: "We find that the lower court construed section 5440 to mean a certain thing, which construction renders the indictment bad. We construe section 5440 differently, and this renders the indictment good." Can anything of this kind be said in this case? Must not the court, instead, say that the lower court simply passed on a question of pleading, and that such a question is not reviewable?

But it may be contended that the lower court passed upon and construed a statute of the United States, to wit, the "timber and stone" act. This is not correct. The court did, it is true, consider the "timber and stone" act, and a large part of its opinion is taken up with discussing that act. Upon the part of the government it was contended that the statute prevented the alienation of timber lands and the making of any contract with reference thereto until after final proof, while, on the

other hand, it was contended that the act only forbade the alienation of lands prior to the first affidavit being filed. Judge Lewis thereupon interpreted the statute just as this court afterwards did in the Williamson case. As will be shown by a later citation of authorities, there is a well recognized difference between "interpretation" and "construction." But even if the court did *construe* the timber and stone act, that fact is immaterial.

The indictment cannot be said for one moment to be "founded" on the timber and stone act.

We submit, upon reason, that the government cannot point to any construction of section 5440 which caused this indictment to be quashed, and that the true situation is that the court, interpreting the timber and stone act, declared that a bad pleading had been filed and that the indictment also appeared to be bad for duplicity.

We think, also, that abundance of authority can be found to support our contention that the writ of error does not lie.

In the case of Deane vs. State, 159 Ind., 313, the Supreme Court of Indiana had occasion to pass upon the question of whether, under the statutes of that state, providing for a direct appeal to the Supreme Court in all cases where there was a construction of a statute by the trial court, the trial court had *construed a statute or had merely passed upon the sufficiency of the indictment as measured by the statute.* At page 316, the court said:

"Appellant's contention under the circumstances certainly cannot be said to present any question for the proper construction of the statute, within the meaning of the exception as declared in section 8, *supra*, but, rather, raises one which wholly relates to the construction of the pleadings. * * * Certainly the phrase 'the proper construction of the statute' can not be said to apply to or include a statute which is so plain in its terms and provisions as to leave no room for judicial construction; otherwise, the prohibition of section 7, denying an appeal, could be easily evaded upon the mere assertion of the appellant that the point involved in the case depended upon the construction of the statute. Where the act is, under its

terms and provisions, plain and unambiguous, and admits of but one meaning, it can not be said to be open to a construction within the meaning of the exception in section 8. Under such circumstances the law, if valid, must be taken and enforced as written, for it is not permissible to interpret or construe that which has no need of construction. The province of construction, as the authorities assert, lies wholly within the domain of ambiguity. Endlich on Interpretation of Stats., section 4. Sedgwick on Statutory Const. (2d Ed.), 195. 23 A. & E. Ency. of Law, 298, and authorities cited in foot note 2. State vs. Sopher, 157 Ind., 360."

In Terre Haute, etc., R. R. Co., vs. Erdel, 158 Ind., 344, 347, the court said:

"Construction can only be employed for the discovery of the true intent and meaning of an instrument, and when the language is plain there can be no construction, because there is nothing to construe. It is preposterous to say that the law makers intended to authorize the bringing of a statute to this court by special proceeding, for construction or interpretation, when there existed no dispute nor ground for dispute as to its intent and meaning."

Inasmuch as the statute uses the word "construction," it is proper to say that many courts have drawn a distinction between the words "construction" and "interpretation."

It is said in Bloomer vs. Todd, 3 Wash. Ter., 612 (s. c., 19 Pac. Rep., 135, 138.):

"Interpretation differs from construction in this: That it is used for the purpose of ascertaining the true sense of any form of words, while construction involves the drawing of conclusions regarding subjects that are not always included in the direct expression."

In Proprietors of Morris Aqueduct ads. Jones, 36 N. J. Law, 206, the court quotes from the definition of Dr. Lieber in his Hermeneutics, where it is said that "interpretation is the mere finding of the true sense of the special form of words used;" that "construction is the drawing of conclusions respecting subjects that lie beyond the direct expression of the text—conclu-

sions which are in the spirit though not within the letter of the text."

The Supreme Court of Nebraska, in the case of State *ex rel.* Hastings, Attorney General vs. Smith, 35 Nebraska, 13. 22, adopts the same rule.

The Court of Appeals of New York, in the case of People *ex rel.* Twenty-third Street R. R. Co. vs. Commissioner of Taxes of the City of New York, 95 N. Y., 554-559, also adopts the distinction made by Dr. Lieber between "interpretation" and "construction" of a statute.

But it cannot even be said that the trial court quashed the indictment in the case at bar on an "interpretation" of section 5440. The truth is that when the trial *court construed the "timber and stone" act* to mean just what this court afterwards construed it to mean in the Williamson case, this indictment fell to the ground.

(2) We now come to consider the second proposition above advanced, viz., that the court has no jurisdiction on the alleged ground of the sustaining of a plea in bar to the indictment, because, as we maintain, the written opinion of Judge Lewis shows that he did not sustain any plea in bar. The facts as shown by the record are simply that the court in its opinion held the indictment stated no offense and that it would also appear that the objection as to duplicity was well taken. The court nowhere in its opinion states that the plea in bar was sustained, the opinion simply reciting that either the plea is good or the indictment is bad for duplicity, and that this dilemma renders the indictment bad.

We submit that the court having held that the indictment stated no offense, it was unnecessary for it to in any way pass on the plea of the statute of limitations, and that anything it may have said with reference to that plea, once the indictment was quashed, was intended merely as an expression of the court's views to aid the district attorney in the future drawing of indictments.

It is true, of course, that the order quashing the indictment, found at page 73 of the printed record, was followed by a later order (page 74) which purports to quash the indictment and then also sustain a plea to it. But just how a court can

legally sustain a plea in bar to an indictment which has already been quashed is hardly clear. We think that, reading between the lines, it must be clear that this change of the court's order was simply a kindly act of the court for the purpose of throwing no stumbling block in the way of the government getting a review of an adverse ruling; an act well meant, but wholly abortive.

We contend that the court's *opinion* as to what its ruling was must control, and that this opinion shows that no plea in bar was sustained.

(3) But let us now take up our third proposition, which is, that even if the court did sustain the plea in bar, still the court has no jurisdiction, in that its ruling quashing the indictment was final, and cannot now be reveiewed, which would, of course, make it unnecessary for this court to pass upon the plea of the statute of limitations. In other words, the indictment being finally and forever quashed, the question as to the plea is merely a moot question. How this proposition can ever be successfully answered we do not know. It seems to be absolutely conclusive.

In order to ever get to a point where the court can consider the plea of the statute of limitations, counsel for the plaintiff in error must first successfully maintain that the judgment of the court quashing the indictment was based upon a construction by the court of section 5440. If it appears to the court, as we think it must, that this was not true, or if it appears to the court, as we think it must, that the court held the indictment also bad for duplicity, then we cannot see how the superfluous act of the court in thereafter sustaining a plea of the statute of limitations to an indictment already quashed can be reviewed on writ of error.

We have not yet found any decision directly in point on this question, but there is an abundance of authority on analogous questions.

Take, for instance, the question of the right of this court to review the decision of a state court on the ground that a federal question was presented for decision by the state court. It has been repeatedly held that to confer jurisdiction the federal question must have been the controlling question decided.

In Eustis vs. Bolles, 150 U. S., 361, 366, it is said:

"It is settled law that to give this court jurisdiction of a writ of error to a state court, it must appear affirmatively, not only that a federal question was presented for decision by the state court, but that its decision was necessary to the determination of the cause, and that it was actually decided adversely to the party claiming a right under the federal laws or Constitution, or that the judgment as rendered *could not have been given without deciding it.* Murdock vs. Memphis, 20 Wall., 590; Cook County vs. Calumet and Chicago Canal Company, 138 U. S., 635."

"It is likewise settled law that where the record discloses that if a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, another question, not federal, has been also raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the federal question, to sustain the judgment, this court will not review the judgment."

The court then quotes from the case of Klinger vs. Missouri, 13 Wall., 257, 263, where, among other things, it is said:

"'This court will not take jurisdiction of the case even though it might think the position of the state court an unsound one.'" (Having reference to the other question, not federal, decided by the state court.)

See, also, to the same effect:

Bushnell vs. Mining Co., 148 U. S., 682, 690.

Railway Co. vs. Fitzgerald, 160 U. S., 556, 576.

Giles vs. Teasley, 193 U. S., 146, 160.

Sloan vs. U. S., 193 U. S., 614, 620.

Caro vs. Davidson, 197 U. S., 197, 200.

Empire Co. vs. Hanley, 205 U. S., 225, 233.

A somewhat analogous question has been passed upon a number of times by the Supreme Court of Colorado. A statute of the state gave appellate jurisdiction to the Court of Appeals in all cases except where the judgment exceeded a certain sum,

or where the matter in controversy related to a franchise or freehold, or where the construction of a provision of the state or federal Constitution was necessary to the determination of the case. In such exceptional cases the Supreme Court was given appellate jurisdiction. It was held that, in order to give the Supreme Court jurisdiction on the ground of a constitutional question, it must appear from the record not only that the decision of a constitutional question was necessary, *but in addition that the question involved must be a fairly debatable one.*

Trimble vs. People, etc., 19 Colo., 187.
Board vs. McIntire et al., 23 Colo., 137.
Madden vs. Day, 24 Colo., 418.
Bank vs. Board, 29 Colo., 114.
Hecht vs. Wright, 31 Colo., 117.
Gregg vs. Board, 32 Colo., 357.

The latter decision declares that if the decision of the trial court can be affirmed without passing on the constitutional question, it is the duty of the Supreme Court to so declare, even though such determination withdraws the case from its jurisdiction and inferentially constitutes an adjudication on its merits.

We submit that this court should declare that to give this court jurisdiction, even where an indictment is quashed because of a construction of the statute upon which the indictment is founded, there must appear to be a fairly debatable question as to whether or not the construction of the lower court is correct, and that it should also declare that, in addition, it must be shown that a construction of the statute *was necessary* to determine the demurrer or motion to quash. In this case the court did not construe the statute on which the indictment was founded, but had it done so, it would have been an unnecessary act, as the indictment was defective in many respects.

We also submit that the court should also declare that the sustaining of a plea in bar does not confer jurisdiction on this court, where an indictment has been quashed on other grounds than that mentioned in the 1907 writ of error statute.

Respectfully submitted,

EDMUND F. RICHARDSON,
HORACE N. HAWKINS,
Attorneys for Defendants in Error.

UNITED STATES *v.* FREEMAN.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

No. 288. Argued December 16, 17, 1908.—Decided January 4, 1909.

Decided on the authority of *United States* v. *Biggs, ante,* p. 507.

THE facts are stated in the opinion.

The Attorney General and *The Solicitor General,* with whom *Mr. Edwin W. Lawrence,* Special Assistant to the Attorney General, was on the brief for the United States.[1]

Mr. Charles J. Hughes and *Mr. Clyde C. Dawson* for defendants in error.[1]

MR. JUSTICE WHITE delivered the opinion of the court.

In this case the court below quashed an indictment, and a writ of error direct from this court is prosecuted on behalf of the United States, upon the theory by which it prosecuted the writ in the case of *United States* v. *Biggs et al.,* No. 289, just decided. The case presented by the record, omitting references to irrelevant distinctions in the form of the pleadings, is like that in the *Biggs case,* and is controlled and disposed of by the opinion just announced therein.

Affirmed.

[1] For abstracts of arguments see *ante,* p. 507.

UNITED STATES *v.* BIGGS.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

No. 289. Argued December 16, 17, 1908.—Decided January 4, 1909.

United States v. *Keitel, ante*, p. 370, followed as to the power of this court to review judgments in criminal cases at the instance of the Government under the act of March 2, 1907, c. 2546, 34 Stat. 1246.

The timber and stone act of June 3, 1878, c. 151, 20 Stat. 89, as amended by the act of August 4, 1892, c. 375, § 2, 27 Stat. 348,[1] while prohibiting the entryman from entering ostensibly for himself but in reality for another, does not prohibit him from selling his claim to another after application and before final action. *Williamson* v. *United States*, 207 U. S. 425.

An indictment for conspiracy to defraud the United States by improperly obtaining title to public lands will not lie under § 5440, Rev. Stat., where the only acts charged were permissible under the land laws.

When this court in affirming a judgment in a criminal case under the act of March 2, 1907, c. 2546, 34 Stat. 1246, has decided on a broad ground that the Government cannot prosecute the case, it is not necessary for it to decide the other questions involved which thereby become irrelevant.[2]

157 Fed. Rep. 264, affirmed.

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[1] For an abstract of the timber and stone act see note in *Williamson* v. *United States*, 207 U. S. 425, 455.

[2] The point not passed on was, as stated in the syllabus of the opinion in the case below: An indictment under Rev. Stat. § 5440 for conspiracy to defraud the United States, which sets out a number of overt acts on different dates, is either bad for duplicity, as charging more than one conspiracy, or if held to charge a single continuing conspiracy, the offense was consummated when the first overt act was committed, and from that date the statute of limitations began to run.

THE facts are stated in the opinion.

The Attorney General and *The Solicitor General*, with whom *Mr. Edwin W. Lawrence*, Special Assistant to the Attorney General, was on the brief for the United States:

Here, as in the coal land cases, the argument is that the court below merely held that the facts charged in the indictment were not within the statute, and therefore the indictment and not the statute was interpreted or construed. That contention, the court in those cases held to be devoid of all merit. *United States* v. *Keitel*, *ante*, p. 370.

As the court below in construing the indictment really construed the law and merely applied that construction to the indictment, it seems proper for the Government to discuss the indictment in the light of its language as drawn from the law itself, notwithstanding this court held in the *Keitel case* that, on such a writ of error, it has not jurisdiction to consider alleged defects in the indictment or misconstruction of the indictment irrespective of construction of the statute.

"To enter" in the third section of the law refers to final proofs and payment, but "make entries" in the indictments is not to be so construed. The word "entry" often refers to the filing of the inceptive right as in the early case of *Chotard* v. *Pope*, 12 Wheat. 586. That is the popular sense as shown by the dictionaries, but the technical meaning includes the proceedings as a whole and the complete transfer of title. *Dealy* v. *United States*, 152 U. S. 539, 544, 545; *Hastings &c. R. R.* v. *Whitney*, 132 U. S. 357, 363.

"To obtain" lands signifies similarly the complete process of acquisition, and since the indictment, following the law, describes these lands as "open to entry," the charge includes the initial application. In *Adams* v. *Church*, 193 U. S. 516, referring to the timber culture law, the meaning attached to *entry* is the original application, the court using the language, "after entry and before final proof." And under this very law in *Williamson* v. *United States* the court uses the

term in precisely the same sense, viz.: "in the interim between entry and final proof." 207 U. S. 461.

The indictments sufficiently charge a conspiracy to defraud, although the conspiracy did not embrace the making of false and fraudulent applications.

The timber and stone act restricts the quantity of timber land to be sold to 160 acres to any one person or association of persons. A corporation could not, without violating the law, step into the shoes of the various applicants and in its own name take the steps which the law requires for completion of the entries. But this is what the indictments charge that the defendants conspired to do, except that it is alleged that they planned that the applicants should complete the entries without disclosing the interest of the corporation. The applicants would be acting merely as the agents of the corporation, and in each case the sale would be made by the United States to the corporation and not to the entrymen. This is not a *bona fide* contract by an entryman to convey after patent. The *Williamson case* can be distinguished. See *United States* v. *Budd*, 144 U. S. 154; *United States* v. *Trinidad Coal Co.*, 137 U. S. 160.

The coal land statutes did not require the applicant to make an affidavit at entry that he was purchasing solely for his own benefit; neither does the timber and stone act require such an affidavit to be made at the time the lands are *purchased* from the United States. Both statutes prohibit the acquisition from the United States by one person of more than a certain quantity of land. The plan carried out by the Trinidad Coal Company was held fraudulent because the company did indirectly what it could not do directly. This is exactly what the defendants in the present cases are charged with. The end, fraud, being unlawful, it was unnecessary to set out in detail the indirect means contemplated by the conspiracies. *Dealy* v. *United States*, 152 U. S. 539, 543; *Burton* v. *United States*, 202 U. S. 344; *Thomas* v. *United States*, 156 Fed. Rep. 897; *United States* v. *Grunberg*, 131 Fed. Rep.

137; *Thomas* v. *People*, 113 Illinois, 131; *People* v. *Bird*, 126 Michigan, 631.

If there ever was a rule that the statute of limitations begins to run as soon as the first overt act in pursuance of a conspiracy has been committed and in three years thereafter the bar is complete, it has been entirely superseded by the rule that the crime consists in putting a corrupt agreement into operation, and the limitation runs from the date of the last overt act committed for the purpose of effecting the object of the conspiracy. The question is whether the conspiracy is in existence, and overt acts of individual conspirators committed within the period of the statute are evidence of a renewal and continuance of the conspiracy. *Ware* v. *United States*, 154 Fed. Rep. 577, and cases cited. At least four cases involving this point have recently been brought before the court on petition for certiorari, and the petitions have been denied. *Lorenz* v. *United States*, 196 U. S. 640; *Bradford* v. *United States*, 206 U. S. 563; *Ware* v. *United States*, 207 U. S. 588; *Jones* v. *United States*, this term, *post*.

All that was decided in *Adams* v. *Church* and *Williamson* v. *United States* touching the point in the present case was that an entryman has the right to dispose of his holding acquired in good faith before the final certificate. No question was involved in either case of the acreage restriction in the timber culture law and this law, respectively, or of the right of a purchaser to *buy*. It was determined that the entryman had the right to *sell*. An entryman's right to sell *ad interim* depends upon his good faith, and he is bound in good faith to disclose his principal, although it may not be criminal for him not to do so or even to swear to the contrary. A purchaser cannot legally buy in the interim between application and final proof, that is, before title has been acquired from the United States, if he has already bought one tract. He is a disqualified purchaser. Entrymen who are not themselves conspirators and who are acting separately are nevertheless the agents, although unconscious and innocent, it may be,

of an undisclosed principal. The Government is not prosecuting the entrymen but the conscious agents of the principal conspiring to violate the law and evading its prohibition by procuring from the United States indirectly through the entrymen more land than the principal could buy directly. If the *Williamson case* means that title vests in the entryman as soon as he makes preliminary application, and that a purchaser in the interim before final proof would be buying from him and not from the United States, just as much as after final proof and payment or after patent, then indeed it is conclusive against the Government here, and there is no violation of law, for the law does not mean what it seems to mean by its acreage restriction. Otherwise this scheme is a fraud, because it is sought to obtain lands from the United States indirectly in violation of law, just as much as the scheme in the *Trinidad case*, or in the *Keitel case*, or the *Forrester case*, which is said by the court not to be distinguishable from the *Keitel case* as involving a violation of the coal land law.

Unless there is less meaning and force in the prohibition of the timber and stone law than in the prohibition of the coal land law, and unless there is some difference which we do not perceive between the interim status of an entryman here and the status of a preference entryman in the corresponding interval under the coal land law, this case is not distinguishable from the case of the coal preference entries (the *Forrester case*), and if the *Williamson case* does not rule that case, neither does it rule this.

Mr. Charles J. Hughes and *Mr. Clyde C. Dawson* for defendants in error:

This court is without jurisdiction of these writs of error under the act of March 2, 1907:

Because neither § 5440 nor the timber and stone act were held invalid; nor were either of said statutes the subject of construction by the District Court; nor can the jurisdiction of this court be sustained under the clause of the act of March 2,

1907, relating to judgments sustaining "a special plea in bar," for neither a "special plea in bar" nor a judgment sustaining a "special plea in bar" appear in the records.

No offense is charged in the indictments.

There are many "laws" of the United States under which timber lands may be entered. There is only one of those laws which indicates any policy of the Government restricting the amount of land which may be entered by any one individual or corporation. These indictments charge conspiracy to procure the entering of lands under some of these laws, but do not in any manner allege that this conspiracy was a conspiracy to procure entries under the one law which restricts the amount that can be entered. The defendants are entitled to the presumption that their combination was one to procure entries under the laws which do not so restrict the area of entry, and not under the law which does so restrict it.

And, therefore, these indictments do not charge any attempt to "defraud the United States in any manner for any purpose."

Under the restrictive law to which we have referred, the only thing which the Congress of the United States attempted to prevent is the making of contracts, before the making of applications to purchase, whereby the entryman binds himself to convey the title which he shall acquire from the Government to some other person.

It must be presumed that the intent of the entrymen was innocent, and that they did not conspire to make these contracts of conveyance at any time when the laws of the United States, as interpreted by its Supreme Court, prohibited such action. *Williamson* v. *United States*, 207 U. S. 425.

The only point where any representation in regard to such agreements of conveyance is required, is at the making of the application; that is to say, when the first application is made to the officers of the Government.

To "defraud the United States" a false representation of some fact is necessary, and these indictments show no con-

spiracy to procure the making of any representations by any person whatsoever. It is only by the most violent presumption that such conclusions can be reached from the allegations of these indictments. In the absence of such affirmative allegations the defendants are entitled to the presumption that they did not conspire to procure the making of any false representations whatsoever, or any representation at a time when the same would be false, and hence did not conspire to "defraud the United States" in any manner or for any purpose.

The making of false representations, if alleged, in violation of a Land Department regulation imposing on the entryman a condition not contained in the law, would constitute no offense. *Williamson* v. *United States, supra.*

If such regulation exists it has not been pleaded, and hence cannot be relied upon. *United States* v. *Bedgood*, 49 Fed. Rep. 54; *United States* v. *Eaton*, 144 U. S. 677, 687, 688; *United States* v. *Maid*, 116 Fed. Rep. 650; *United States* v. *Blassingame*, 116 Fed. Rep. 654; *Anchor* v. *Howe*, 50 Fed. Rep. 366; *United States* v. *Howard*, 37 Fed. Rep. 666; *Hoover* v. *Salling*, 110 Fed. Rep. 43; *United States* v. *Manion*, 44 Fed. Rep. 801; *United States* v. *Hoover*, 133 Fed. Rep. 950; *United States* v. *Matthews*, 146 Fed. Rep. 306; *United States* v. *United Verde Copper Co.*, 196 U. S. 207; *Williamson* v. *United States*, 207 U. S. 425.

Conclusions of law and of the pleader and not facts are pleaded.

References to the overt acts are necessary in order to determine definitely the conspiracy charged.

There is no certainty of allegation as to the time of the alleged offense conspired to be accomplished.

There is no allegation that the defendants conspired to defraud the United States.

The overt acts, alleged in each indictment, show on their face that no one of them was done in pursuance of the conspiracies charged nor to effect the object of the same, and

hence in failing to charge an overt act to effect the object of the conspiracies the indictments fail to charge a crime.

MR. JUSTICE WHITE delivered the opinion of the court.

It is adequate to an understanding of the questions which are here necessary to be decided in general terms to say that the indictment against the defendants in error charged them with conspiracy in violation of the second clause of § 5440, Rev. Stat., which makes it criminal to conspire to defraud the United States "in any manner or for any purpose." The means by which it was contemplated that the United States should be defrauded was charged in the indictment to have been the unlawful obtaining by purchase under the timber and stone act of public land of the United States in excess of the quantity authorized by law to be acquired. The timber and stone act when originally enacted in June, 1878, related solely to public lands within particular States. 20 Stat. c. 151, 89. In 1892, however, that act was amended by striking out the designation of particular States, thus causing the act to apply to "surveyed public lands of the United States within the public land States." 27 Stat. c. 375, 348. As it is essential to have that act in mind we excerpt from the opinion of the court below a succinct but comprehensive and accurate statement of its provisions:

"This act in its first section specifies the qualifications of purchasers or entrymen thereunder, and limits the amount of land which each may acquire to one hundred and sixty acres. The second section provides that the applicant, at the time of his application, shall file a written statement in duplicate under oath with the register, describing the land which he desires to purchase and its quality, that he has made no other application under this act, and that he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit, and that he has not, directly or indirectly, made any agreement or

contract in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the Government of the United States should inure, in whole or in part, to the benefit of any person except himself. It then provides that if he swears falsely he shall be guilty of perjury and forfeit the money which he paid for said lands, and all right and title to the same, and any grant or conveyance which he may have made, except in the hands of *bona fide* purchasers, shall be null and void. The third section provides that on the filing of the applicant's statement the register shall post a notice of the application in his office for a period of sixty days, and that the applicant shall publish the same notice in a newspaper nearest the location of the premises for a like period of time, and after the expiration of said sixty days, if no adverse claim shall have been filed, the party desiring to purchase shall furnish to the register of the land office satisfactory evidence, first, that said notice of the application prepared by the register as aforesaid was duly published in a newspaper as herein required; secondly, that the land is of the character contemplated in this act, unoccupied and without improvements, etc., etc., and upon payment to the proper officer of the purchase money of said land, together with the fees of the register and receiver, etc., etc., the applicant may be permitted to enter said land, and a patent shall issue thereon. It further provides that any person having a valid claim to any portion of the land may object in writing to the issuance of the patent, and evidence shall be taken thereon as to the merits of said objection."

The indictment contained one count, supported by averments of fourteen overt acts.

The accused after moving to quash on the ground of the illegality of the organization of the grand jury, demurred to the indictment on a number of technical grounds, and upon the contentions that the facts stated in the indictment were insufficient to charge an offense within any statute of the United States, and that as the indictment had not been found

within three years of the commission of the acts therein alleged, the right to prosecute for the same was barred by the statute of limitations. The court held the indictment stated no offense against the United States, and, sustaining the demurrer upon that ground, discharged the accused without date. It was also held that if the indictment was construed as embracing but one offense, the three years' bar of the statute of limitations was controlling, but that if it were held that the indictment stated more than one offense, thus saving one of the offenses from the operation of the statute of limitations, the indictment would be void for duplicity.

The reasons which caused the court to reach the conclusions just stated were expounded in an opinion. Therein, in order to determine whether the indictment stated an offense against the United States, the court came first to construe it in the light of the provisions of the timber and stone act. In doing so the court said:

"We find that the indictment sets in where the second section of the timber and stone act leaves off. It charges that the purpose of the conspiracy was to 'hire and under agreements' with entrymen have them pay for the lands with moneys of the corporation and have them make entries. It does not charge the date on which such hiring and agreements to make entries were to be made, nor that the entrymen were hired to make applications, nor that said hiring and agreements were prior to any application. The indictment appears to attempt to challenge some acts done by the entrymen under the provisions of section 3 of said act, to wit: The hiring of and agreement with entrymen (who had made application before that under section 2 of the act) to make entries and pay for the land with moneys furnished by the corporation. . . . But it is said the indictment charges a violation of section 1 of the act in the acquisition of more land by the corporation than there limited. When it comes to that the indictment does not charge that the several entrymen were disqualified as such,

nor that when they made application they had outstanding contracts to sell, or were then acting under agreements or hire for said defendants or said corporation. A compliance with the timber and stone act, by the entrymen, in both its spirit and letter, prior to and at time of application is not challenged by the indictment."

Having thus construed the indictment it was then considered whether any offense was therein stated against the United States. In deciding that no offense was stated it was held that although it were conceded that the timber and stone act prohibited an entryman or applicant from making an application ostensibly in his own name, but in reality for and on behalf of another, that if an applicant or entryman made an application in good faith for his own exclusive use and benefit the statute contained no prohibition, express or implied, against the right of the entryman, after his application and before the final action thereon, to sell to another the claim to the land which had arisen from his application. It was therefore decided that such applicant was at liberty to contract with another to convey the land covered by the application and to perfect his entry for the purpose of fulfilling his contract to convey the land after patent. In reaching this conclusion the court was controlled by the decision in *Adams* v. *Church*, 193 U. S. 510, giving a like construction to the timber culture act of June 14, 1878, c. 190, 20 Stat. 113. Having thus decided that the indictment as construed charged the doing of no unlawful act, but simply the exercise of a lawful right not in any way prohibited, but on the contrary impliedly sanctioned by the statute, it was decided that under no possible construction could the acts charged constitute an unlawful conspiracy within the second clause of § 5440, Rev. Stat. And for additional reasons expressed in the opinion the conclusions of the court concerning the bar of the statute of limitations and the duplicity of the indictment, if it were so construed as to save it from the statute, were fully expressed.

This writ of error, direct from this court, is prosecuted by the United States under the authority of the act of 1907.[1]

Our right to review the decision below is questioned by the defendants in error on the ground, first, that the court below did not construe, but simply interpreted, § 5440, Rev. Stat., and the provisions of the timber and stone act; and, second, because, although it applied the bar of the statute of limitations, the court did not do so by way of sustaining a plea in bar, but simply incidentally passed upon that question in deciding the demurrer.

The want of merit in the first contention is established by *United States* v. *Keitel*, No 286 of this term, *ante*, p. 370.

As therefore we have in any event jurisdiction to review the action of the trial court in construing the timber and stone act and in fixing the meaning of § 5440, Rev. Stat., in the light of that construction, we presently pass the consideration of the ruling made by the court in respect to the statute of limitations. We do this because if it be found that the court below was right in its conclusions as to the construction of the timber and stone act and of § 5440, Rev. Stat., its judgment quashing the indictment will be sustained, and its action concerning the statute of limitations will become irrelevant, and will not require examination, unless it be our duty under the act of 1907, which we shall also hereafter consider, to pass upon that question, although its decision will have become wholly unnecessary.

It is also settled by *United States* v. *Keitel*, *supra*, that the right given to the United States to obtain a direct review from this court of the rulings of the lower court on the subjects embraced within the statute of 1907 does not give authority to revise the action of the court below as to the mere construction of an indictment, and therefore in the exercise of our power to review on this record we must accept the construction of the indictment made by the lower court and test its construction of the statute in that aspect.

[1] The act of March 2, 1907, is reproduced in full on p. 398, *ante*.

While not questioning this general rule, the United States insists that the case here presented is an exception to that rule, because of the contention that the construction given by the court below to the indictment was but the necessary result of the misconstruction which the court applied to the timber and stone act, and hence that a review of the construction given to the indictment is necessarily involved in the determination of the correctness of the construction given by the court to the statute. Conceding the premise for the sake of argument, the deduction by which it is sought to apply it to the case in hand is, we think, without foundation. It proceeds upon a subtle separation of particular words or phrases in the indictment from the context of that pleading and the affixing to the words thus separated a penetrating but, nevertheless, too narrow significance for the purpose of establishing the proposition relied upon. On the contrary, we think the conclusion cannot be escaped that the construction given by the court below to the indictment was the result merely of the analysis which the court made of the indictment as an entirety, of its appreciation of the nature and character of the acts therein referred to and of the overt acts alleged, the whole read in the light of the elementary canons of construction applicable to criminal pleadings and elucidated, as the court expressly stated, by the entire absence of anything in the indictment tending to show that the pleader contemplated alleging the existence of any conspiracy to induce the making of applications to purchase.

Coming to consider the construction given by the court to the timber and stone act as applied to the allegations of the indictment, as interpreted by the court, the correctness of the construction given by the court below to the statute is established beyond controversy by the decision in *Williamson* v. *United States*, 207 U. S. 425, announced since the decision below was rendered.

The *Williamson case* was a prosecution for a conspiracy in violation of § 5440, Rev. Stat., to procure the commission of

the crime of subornation of perjury by causing certain affidavits to be made for the purpose of acquiring land under the timber and stone act. At the trial, over exceptions, affidavits as to the *bona fides* of a number of applicants and of the purpose of each in making his application to acquire only for himself were offered in evidence, and like affidavits which were required by the rules and regulations of the Land Department at the time of the final entry were also offered in evidence. The Government insisted that the papers were admissible because the indictment charged a conspiracy to suborn perjury, not only at the time of the application to purchase but also in the subsequent stage of making the final entry, and that even if this were not the case the affidavits made after application were admissible for the purpose of showing the motive which existed at the time the application was made. It was decided that the indictment only charged subornation of perjury at the time of the application. Passing on the alleged contention as to motive, it was held that in view of the requirements as to an affidavit exacted by the statute to be made at the time of the application as to the *bona fides* of the applicant and his intention to buy for himself alone and the absence of any such requirement in the statute as to the final entry, that the prohibition of the statute applied only to the condition of things existing at the time of the application to purchase and did not restrict an entryman after said application was made from agreeing to convey to another and perfecting his entry for the purpose after patent of transferring the land in order to perform his contract. It was, therefore, held that the affidavits made at the final stage of the transaction were not admissible to show motive at the time of the applications to purchase, and that any requirements contained in the rules and regulations of the Land Department making an affidavit essential to show *bona fides*, etc., at the final stage were *ultra vires* and void. In passing upon the subject the ruling to the like effect concerning the timber culture act, made in *Adams* v. *Church*, *supra*, was

reiterated and approved, and declared to be applicable to the timber and stone act, despite immaterial differences in the phraseology of the two acts. The court, after approvingly referring to *Adams* v. *Church*, and after reviewing the timber and stone act, and calling attention to the entire omission of all requirement that statement as to the purpose and intention of the entryman should be made at the date of the final step in the acquisition of the land, said (p. 460): "Indeed, we cannot perceive how under the statute if an applicant has, in good faith, complied with the requirements of the second section of the act, and pending the publication of notice, has contracted to convey, after patent, his rights in the land, his doing so could operate to forfeit his right."

It is insisted by the Government that, however conclusive may be this ruling as to the power of the applicant to sell after application and to perfect his entry for the purpose of enabling him to perform such contract, such ruling does not conclude the contention that a conspiracy formed to induce an entryman who has made his application to purchase subsequently to agree to convey his interest in the land would be a violation of the statute. But we are constrained to say that this is a mere distinction without a difference. The effect of the ruling in the *Williamson case* was to hold that the prohibition of the statute only applied to the period of original application, and ceased to restrain the power of the entryman to sell to another and perfect his entry for the purpose of transferring the title after patent. This being concluded by the decision in the *Williamson case*, the distinction now sought to be made comes to this, that it is unlawful under the statute to conspire to have that done which the statute did not prohibit, and, on the contrary, by implication recognized could be lawfully done without prejudice or injury to the United States in any manner whatever. This also serves to demonstrate that no error was committed by the court below in holding that under § 5440, Rev. Stat., the acts charged in the indictment could not possibly have constituted a defrauding

of the United States in any manner or for any purpose within the intendment of that section.

It remains only to notice the ruling of the court below as to the bar of the statute of limitations. While the act of 1907 [1] gives authority to come directly here to obtain a review of the construction of a statute under the circumstances which the act enumerates, and also authorizes us to review a "decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy," we consider that the power given is coincident with the purpose for which it was conferred, that is, to have determined in a case within the statute the question whether or not the Government is entitled to further prosecute the case, and therefore does not of course call upon us to decide every question of the character referred to in the statute, when by the decision of one of such questions the case is completely disposed of and the other questions have become so irrelevant as to cause it to be in our opinion unnecessary to consider and determine them. Of course, under these circumstances, we intimate no opinion whatever concerning the correctness of the construction adopted by the court below in respect to the statute of limitations.

Affirmed.

UNITED STATES *v.* SULLENBERGER.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

No. 290. Argued December 16, 17, 1908.—Decided January 4, 1909.

Decided on the authority of *United States* v. *Biggs*, *ante*, p. 507.

THE facts are stated in the opinion.

[1] The act of March 2, 1907, is reproduced in full, *ante*, p. 398.

The Attorney General and *The Solicitor General*, with whom *Mr. Edwin W. Lawrence*, Special Assistant to the Attorney General, for the United States.[1]

Mr. Edmund F. Richardson, with whom *Mr. Horace N. Hawkins* was on the brief, for defendants in error:

The indictment contains no charge of a crime, in that it charges the plan or alleged conspiracy of defendants to have been simply an agreement or plan to obtain *indirectly* lands for a corporation that could not, according to the indictment, have been *directly* purchased by the said corporation. A plan to obtain indirectly lands from the Government may or may not be a plan to defraud the Government. Whether or not it is a scheme to defraud the Government necessarily depends upon the question of whether or not the means to be adopted are criminal or unlawful.

No unlawful or criminal means are charged to have been planned or contemplated, there being no claim made in the indictment that the defendants agreed, or planned to hire, employ or induce anyone to make application to purchase lands. In other words, no claim is made anywhere in the indictment that the alleged conspiracy embraced the making of a deal or agreement with any person in advance of that person having made, in good faith, an application to purchase the land. There is, therefore, no charge of a conspiracy to defraud the United States.

The Sixth Amendment to the Constitution secures to the defendants, among other things, the right "to be informed of the nature and cause of the accusation." *United States* v. *Miller*, 7 Pet. 1422; *United States* v. *Cruikshank*, 92 U. S. 542, 558; *Evans* v. *United States*, 153 U. S. 584.

All the essential elements of fact required to be set forth in an indictment must be there charged in direct, positive and explicit language. Any omission in that behalf cannot be

[1] For argument of counsel for United States in this case, see *United States* v. *Biggs et al.*, *ante*, p. 507.

aided by implication, inference, argument, recital or intendment. This principle has been well stated in *United States* v. *Post*, 113 Fed. Rep. 854; *Pettibone* v. *United States*, 148 U. S. 197; *United States* v. *Hess*, 124 U. S. 486; *United States* v. *Staats*, 8 How. 41, 44; *In re Wolf*, 27 Fed. Rep. 606, 611; *In re Corning*, 51 Fed. Rep. 205, 210.

"In an indictment nothing material shall be taken by intendment or implication." *Salla* v. *United States*, 104 Fed. Rep. 544, 547; *Miller* v. *United States*, 133 Fed. Rep. 337; *United States* v. *Hess*, 124 U. S. 483; *United States* v. *Walsh*, 5 Dill. 58, 63; *S. C.*, 28 Fed. Cas., No. 16,636, p. 396; *United States* v. *Martin*, 26 Fed. Cas., No. 15,728; *In re Wolf*, 27 Fed. Rep. 606, 611; *United States* v. *Crafton*, 25 Fed. Cas., No. 14,881; *United States* v. *Watson*, 17 Fed. Rep. 145; *United States* v. *Taffe*, 86 Fed. Rep. 113, 115; *In re Greene*, 52 Fed. Rep. 104, 111, 112, 114; *Evans* v. *United States*, 153 U. S. 584, 587; *Pettibone* v. *United States*, 148 U. S. 197, 203; *United States* v. *Milner*, 36 Fed. Rep. 890; *Conrad* v. *United States*, 127 Fed. Rep. 789, 801; *Stearns* v. *United States*, 152 Fed. Rep. 900, 904; *People* v. *Willis*, 54 N. Y. Supp. 130, 137, citing other authorities.

Mr. Justice White delivered the opinion of the court.

In this case the United States seeks the reversal of the action of the court below in quashing an indictment, the writ of error being prosecuted directly from this court upon the assumption that the case comes within the act of March 2, 1907. The indictment charged a conspiracy in violation of § 5440, Rev. Stat., to unlawfully acquire land of the United States under the timber and stone act. The court gave to the indictment the same construction which it affixed to the indictment in the case of *United States* v. *Biggs et al.*, No. 289, which we have just decided, *ante*, p. 507, and applied the same principles which it expounded in the opinion in that case. Disregarding mere immaterial differences in the form of the pleadings

this case is like the *Biggs case*, and is disposed of by the opinion which we have just announced in that case.

Affirmed.